



Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court

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Summary

After the U.S. Supreme Court held that U.S. courts have jurisdiction pursuant to 28 U.S.C. § 2241 to hear legal challenges on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism (*Rasul v. Bush*), the Pentagon established administrative hearings, called “Combatant Status Review Tribunals” (CSRTs), to allow the detainees to contest their status as enemy combatants, and informed them of their right to pursue relief in federal court by seeking a writ of *habeas corpus*. Lawyers subsequently filed dozens of petitions on behalf of the detainees in the District Court for the District of Columbia, where district court judges reached inconsistent conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

Congress subsequently passed the Detainee Treatment Act of 2005 (DTA) to divest the courts of jurisdiction to hear some detainees’ challenges by eliminating the federal courts’ statutory jurisdiction over *habeas* claims (as well as other causes of action) by aliens detained at Guantanamo. The DTA provided for limited appeals of CSRT determinations or final decisions of military commissions. After the Supreme Court rejected the view that the DTA left it without jurisdiction to review a *habeas* challenge to the validity of military commissions in the case of *Hamdan v. Rumsfeld*, the 109th Congress enacted the Military Commissions Act of 2006 (MCA) (P.L. 109-366) to authorize the President to convene military commissions and to amend the DTA to further reduce detainees’ access to federal courts, including in cases already pending.

In June 2008, the Supreme Court held in the case of *Boumediene v. Bush* that aliens designated as enemy combatants and detained at Guantanamo Bay have the constitutional privilege of *habeas corpus*. The Court also found that MCA § 7, which limited judicial review of executive determinations of the petitioners’ enemy combatant status to that available under the DTA, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas*. The immediate impact of the *Boumediene* decision is that detainees at Guantanamo may petition a federal district court for *habeas* review of the legality and possibly the circumstances of their detention, perhaps including challenges to the jurisdiction of military commissions. President Barack Obama’s Executive Order calling for a temporary halt in military commission proceedings and the closure of the Guantanamo detention facility is likely to have implications for legal challenges raised by detainees. Later this year, the Supreme Court is expected to consider arguments in the case of *Kiyemba v. Obama* as to whether federal *habeas* courts have the authority to order the release into the United States of Guantanamo detainees found to be unlawfully held.

In March 2009, the Obama Administration announced a new definitional standard for the government’s authority to detain terrorist suspects, which does not use the phrase “enemy combatant” to refer to persons who may be properly detained. The new standard is similar in scope to the “enemy combatant” standard used by the Bush Administration to detain terrorist suspects. The standard would permit the detention of members of the Taliban, Al Qaeda, and associated forces, along with persons who provide “substantial support” to such groups, regardless of whether such persons were captured away from the battlefield in Afghanistan. Courts that have considered the Executive’s authority to detain under the AUMF and law of war have reached differing conclusions as to the scope of this detention authority. In January 2010, a D.C. Circuit panel held that support for or membership in an AUMF-targeted organization may constitute a sufficient ground to justify military detention.

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Introduction

Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority “to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States.¹ Soon thereafter, President Bush issued a military order formulating guidelines for the detention and treatment of foreign belligerents captured in the “war on terror” and establishing military commissions to try some detainees for violations of the law of war.² Beginning in early 2002, the United States began transferring suspected foreign belligerents captured in the “war on terror” to the U.S. Naval Station in Guantanamo Bay, Cuba for preventive detention and potential prosecution for any war crimes they may have committed.

In 2004, the Supreme Court issued two key rulings concerning the Executive’s authority to detain persons in the “war on terror.” In *Hamdi v. Rumsfeld*,³ a majority of the Court found that the 2001 AUMF permitted the preventive detention of enemy combatants captured during hostilities in Afghanistan, including those who were U.S. citizens. A divided Court found that persons deemed “enemy combatants” have the right to challenge their detention before a judge or other “neutral decision-maker.” The *Hamdi* case concerned the rights of a U.S. citizen detained as an enemy combatant, and the Court did not decide the extent to which this right also applied to noncitizens held at Guantanamo and elsewhere. However, on the same day that *Hamdi* was decided, the Court issued an opinion in the case of *Rasul v. Bush*,⁴ holding that the federal *habeas corpus* statute, 28 U.S.C. § 2241, provided federal courts with jurisdiction to consider *habeas corpus* petitions by or on behalf of persons detained at Guantanamo.

The Court’s rulings in *Hamdi* and *Rasul* had two immediate consequences. First, the Department of Defense (DOD) established Combatant Status Review Tribunals (CSRTs), an administrative process to determine whether a detainee at Guantanamo was an “enemy combatant.” Second, the U.S. District Court for the District of Columbia began to hear the dozens of *habeas* cases filed on behalf of the detainees, with different judges reaching conflicting conclusions as to whether the detainees had any enforceable rights available other than the bare right to petition for *habeas*.

After the Supreme Court granted certiorari to hear a challenge by one of the detainees to his trial by military tribunal, Congress passed the Detainee Treatment Act of 2005 (DTA)⁵. The DTA requires uniform standards for interrogation of persons in the custody of the DOD, and expressly bans cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency. At the same time, however, it divested the courts of jurisdiction to hear challenges by those detained at Guantanamo Bay based on their treatment or living conditions. The DTA also eliminated the federal courts’ statutory jurisdiction over *habeas* claims by aliens challenging their detention at Guantanamo Bay, but provided for limited appeals of status determinations made pursuant to the DOD procedures for CSRTs, along with final decisions by military commissions.

¹ P.L. 107-40.

² Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, 66 Federal Register 57833 (2001)(hereinafter “MO” or “military order”).

³ 542 U.S. 507 (2004).

⁴ 542 U.S. 466 (2004).

⁵ P.L. 109-148, Title X; P.L. 109-163, Title XIV.

However, in the 2006 case of *Hamdan v. Rumsfeld*,⁶ the Supreme Court interpreted the provision eliminating federal *habeas* jurisdiction as being inapplicable to cases that were pending at the time the DTA was enacted, permitting it to review the validity of military commissions established pursuant to President Bush's 2001 military order. The Court held that the military tribunals established by the President did not comply with the Uniform Code of Military Justice (UCMJ) or the law of war which the UCMJ incorporates, including the 1949 Geneva Conventions. In response to the *Hamdan* ruling, Congress enacted the Military Commissions Act of 2006 ("MCA" or "2006 MCA").⁷ The act authorized the President to convene military commissions to try "unlawful alien combatants" for war crimes without complying with the parts of the UCMJ the earlier system was said to violate, and it also established procedural requirements for the commissions. Finally, the MCA expressly eliminated court jurisdiction over all pending and future causes of action by detainees, including *habeas* review, with the exception of the limited review process established under the DTA.

The complete elimination of *habeas corpus* review by Congress compelled the courts to address directly an issue they had avoided reaching in earlier cases: Does the constitutional writ of *habeas corpus* extend to noncitizens held at Guantanamo? The Constitution's Suspension Clause prohibits the suspension of *habeas corpus* except when public safety requires it in the case of invasion or surrender. The MCA did not purport to be a suspension of *habeas*, and the government did not make such a claim to the courts. Instead, the government argued that noncitizens detained at Guantanamo are entitled to no constitutional protections, including the privilege of *habeas corpus*. Therefore, it was argued, denying these persons access to *habeas* review would not run afoul of the Suspension Clause. In the 2008 case *Boumediene v. Bush*, the Court rejected this argument in a 5-4 opinion, and ruled that the constitutional privilege of *habeas* extends to Guantanamo detainees and cannot be extinguished by statute unless an adequate substitute is provided.⁸

As a result of the *Boumediene* decision, detainees currently held at Guantanamo may petition for *habeas* review of their designation and detention as enemy combatants. Several legal issues remain unsettled, including the scope of *habeas* review available to detainees, the remedy available for those persons found to be unlawfully held by the United States, and the extent to which other constitutional provisions extend to noncitizens held at Guantanamo and elsewhere. Some of these issues may be decided by Supreme Court later this term in the case of *Kiyemba v. Obama*, which concerns the authority of *habeas* courts to order the release of Guantanamo detainees into the United States, when those detainees are found to be unlawfully held and the government is unable to effectuate their release to a foreign country. The judicial process established by the DTA was effectively nullified by a D.C. Circuit's ruling in January 2009 interpreting the *Boumediene* decision,⁹ although Congress has not officially repealed it.¹⁰

⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁷ P.L. 109-366.

⁸ *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008).

⁹ *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).

¹⁰ P.L. 111-84, § 1803(b), 123 Stat. 2612, struck section 1005(e)(3) of the "Detainee Treatment Act of 2005" (title X of P.L. 109-359; 10 U.S.C. 801 note) pertaining to appellate review of military commission decisions, but left intact paragraph 2, pertaining to appellate review of CSRT proceedings, as well as language similar to paragraph 3 passed as section 1405(e)(3) of title XIV of P.L. 109-163, which continues to refer to pre-MCA military commissions. (The reference to P.L. 109-359 should probably be P.L. 109-148).

On January 22, 2009, President Obama issued an Executive Order requiring that the Guantanamo detention facility be closed as soon as practicable, and no later than a year from the date of the Order.¹¹ The Order further requires specified officials to review all Guantanamo detentions to assess whether the detainee should continue to be held by the United States, be transferred or released to a third country, or be prosecuted by the United States for criminal offenses.¹² During the review process, the Secretary of Defense was required to take steps to ensure that all proceedings before military commissions and the United States Court of Military Commission Review were halted.¹³ Although the imposed deadline for closing the Guantanamo detention facility was not met, the Obama Administration maintains that it intends to close the facility as expeditiously as possible. The closure of the Guantanamo detention facility and its resulting effects could have implications for legal challenges raised by detainees, particularly if detainees are brought to the United States, where they would arguably have a more clearly defined entitlement to additional constitutional protections.¹⁴

In March 2009, the Obama Administration announced a new definitional standard for the government's authority to detain terrorist suspects, which no longer employs the phrase "enemy combatant" to refer to persons who may be properly detained,¹⁵ although the new standard is largely similar in scope to the "enemy combatant" standard used earlier. The Obama Administration standard would permit the detention of members of the Taliban, Al Qaeda, and associated forces, along with persons who provide "substantial support" (rather than merely "support") to such groups, regardless of whether these individuals were captured away from the battlefield in Afghanistan.¹⁶ The Obama Administration indicated that this definitional standard does "not rely on the President's authority as Commander-in-Chief independent of Congress's specific authorization."¹⁷

The scope of the Executive's detention authority has been subject to ongoing litigation and conflicting rulings. As of January, 2010, courts have ruled that nine detainees are lawfully held pursuant to the AUMF while 32 were held to be (or were conceded by the government to be) held without authorization.¹⁸ In January 2010, a D.C. Circuit panel held in the case of *Al-Bihani v. Obama*¹⁹ that support for or membership in an AUMF-targeted organization may be independently sufficient to justify military detention, without proof that the detainee committed any hostile act. In discussing the scope of the Executive's detention authority, the panel applied

¹¹ Executive Order 13492, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," 74 *Federal Register* 4897, January 22, 2009.

¹² *Id.* at § 4.

¹³ *Id.* at § 7.

¹⁴ For further discussion, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

¹⁵ Department of Justice, "Department of Justice Withdraws 'Enemy Combatant' Definition for Guantanamo Detainees," press release, March 13, 2009, <http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html> (hereinafter "DOJ Press Release"); *In re Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held At Guantanamo Bay*, No. 08-0442, filed March 13, 2009 (D.D.C.) (hereinafter "Detention Authority Memorandum").

¹⁶ Detention Authority Memorandum, *supra* footnote 15, at *7-8.

¹⁷ DOJ Press Release, *supra* footnote 15.

¹⁸ For a list of cases as well as a discussion of broader issues, see Benjamin Wittes, Robert Chesney & Rabea Benhalim, *The Emerging Law of Detention: The Guantanamo Habeas Cases as Lawmaking*, Brookings Institute, January 22, 2010, available at http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx.

¹⁹ *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411 (D.C. Cir. Jan. 5, 2010).

the standard that had been used by the Bush Administration rather than the slightly more limited standard applied by the Obama Administration, and disavowed the view that international law has relevance to the determination. The significance of this policy change and the circuit court's ruling remains to be seen.

Also in January 2010, the Obama Administration reportedly completed its assessment of the detainees, determining that about 50 of the detainees held there will continue to be held without trial; that around 35 detainees will be prosecuted in military commission or federal court; and that suitable countries have been found to take the remaining 110 detainees.²⁰ However, the transfer of 30 detainees of Yemeni nationality back to Yemen was stymied because an Al Qaeda affiliate in Yemen is suspected to have been behind the Christmas 2009 bombing attempt.²¹ Additionally, Congress has balked at plans to bring detainees to the United States for continued detention or for trial.

This report provides an overview of the early judicial developments and the establishment of CSRT procedures; summarizes selected court cases related to the detentions and the use of military commissions; and discusses the Detainee Treatment Act, as amended by the Military Commissions Act of 2006 and the Military Commissions Act of 2009, analyzing its effects on detainee-related litigation in federal court. The report summarizes the Supreme Court's decision in *Boumediene* invalidating Congress's efforts to revoke the courts' habeas jurisdiction, and discusses some remaining issues and subsequent developments. For discussion of legislation introduced in the 111th Congress concerning detainees, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Anna C. Henning. For legislation related to *habeas corpus* rights of detainees, see CRS Report R41011, *Habeas Corpus Legislation in the 111th Congress*, by Charles Doyle.

Early Developments in the Detention and Trial of Enemy Combatants Captured in the “War on Terror”

The Bush Administration determined in February 2002 that Taliban detainees are covered under the Geneva Conventions,²² while Al Qaeda detainees are not,²³ but that none of the detainees qualifies for the status of prisoner of war (POW).²⁴ The Administration deemed all of them to be “unlawful enemy combatants,” and claimed the right to detain them without trial or continue to hold them in preventive detention even if they are acquitted of criminal charges by a military tribunal. Fifteen of the detainees had been determined by the President to be subject to his military order (“MO”) of November 13, 2001,²⁵ making them eligible for trial by military

²⁰ See Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, NY TIMES, Jan. 22, 2010.

²¹ *Id.*

²² The two most relevant conventions are the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516 (hereinafter “GC”).

²³ White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” (February 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>.

²⁴ For more history and analysis, see CRS Report RL31367, *Treatment of “Battlefield Detainees” in the War on Terrorism*, by Jennifer K. Elsea.

²⁵ Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, November 13, 2001, 66 *Federal Register* 57833 (2001)(hereinafter “MO” or “military order”).

commission for war crimes offenses.²⁶ The Supreme Court, however, found that the procedural rules established by the Department of Defense to govern the military commissions were not established in accordance with the Uniform Code of Military Justice (UCMJ).²⁷ The following sections trace the judicial developments with respect to the detention of alleged enemy combatants.

***Rasul v. Bush*²⁸**

Petitioners were two Australians and twelve Kuwaitis (a petition on behalf of two U.K. citizens was mooted by their release) who were captured during hostilities in Afghanistan and were being held in military custody at the Guantanamo Bay Naval Base, Cuba. The Bush Administration argued, and the court below had agreed, that under the 1950 Supreme Court case *Johnson v. Eisentrager*,²⁹ “the privilege of litigation” does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’” The Supreme Court distinguished *Rasul* by noting that *Eisentrager* concerned the *constitutional* right to *habeas corpus* rather than the right as implemented by statute. The *Rasul* Court did not reach the constitutional issue, but found authority for federal court jurisdiction in 28 U.S.C. § 2241, which grants courts the authority to hear applications for *habeas corpus* “within their respective jurisdictions,” by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.”³⁰

The Court also declined to read the statute to vary its geographical scope according to the citizenship of the detainee. Justice Kennedy, in a concurring opinion, would have found jurisdiction over the Guantanamo detainees based on the facts that Guantanamo is effectively a U.S. territory and is “far removed from any hostilities,” and that the detainees are “being held indefinitely without the benefit of any legal proceeding to determine their status.” Noting that the Writ of Habeas Corpus (“Writ”) has evolved as the primary means to challenge executive detentions, especially those without trial, the Court held that jurisdiction over *habeas* petitions does not turn on sovereignty over the territory where detainees are held. Even if the *habeas* statute were presumed not to extend extraterritorially, as the government urged, the Court found that the “complete jurisdiction and control” the United States exercises under its lease with Cuba would suffice to bring the detainees within the territorial and historical scope of the Writ.

²⁶ For an analysis of the military commission rules, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

²⁷ Chapter 47 of title 10, U.S. Code, 10 U.S.C. § 801 *et seq.*

²⁸ 542 U.S. 466 (2004).

²⁹ 339 U.S. 763 (1950).

³⁰ *Rasul*, 542 U.S. at 478-79. When *Eisentrager* was decided in 1950, the *Rasul* majority found, the “respective jurisdictions” of federal district courts were understood to extend no farther than the geographical boundaries of the districts (citing *Ahrens v. Clark*, 335 U.S. 188 (1948)). According to the Court, that understanding was altered by a line of cases, recognized in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), as overruling the statutory interpretation that had established the “inflexible jurisdictional rule” upon which *Eisentrager* was implicitly based. Justice Scalia, with Chief Justice Rehnquist and Justice Thomas, dissented, arguing that the *habeas* statute on its face requires a federal district court with territorial jurisdiction over the detainee. The dissenters would have read *Braden* as distinguishing *Ahrens* rather than overruling it. For more analysis of the *Rasul* opinion, see CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea.

Without expressly overruling *Eisentrager*, the Court distinguished the cases at issue to find *Eisentrager* inapplicable. *Eisentrager* listed six factors that precluded those petitioners from seeking *habeas* relief: each petitioner “(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.”³¹ The *Rasul* Court noted that the Guantanamo petitioners, in contrast, “are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”

As to the petitioners’ claims based on statutes other than the *habeas* statute, which included the federal question statute³² as well as the Alien Tort Statute,³³ the Court applied the same reasoning to conclude that nothing precluded the detainees from bringing such claims before a federal court.³⁴

The Court’s opinion left many questions unanswered. It did not clarify which of the *Eisentrager* (or *Rasul*) factors would control under a different set of facts.³⁵ The opinion did not address whether persons detained by the U.S. military abroad in locations where the United States does not exercise full jurisdiction and control would have access to U.S. courts. The *Hamdan* opinion seems to indicate that a majority of the Court regarded *Eisentrager* as a ruling denying relief on the merits rather than a ruling precluding jurisdiction altogether.³⁶ Under this view, it may be argued, there was no statutory bar precluding detainees in U.S. custody overseas from petitioning for *habeas* relief in U.S. courts, although it may be substantially more difficult for such prisoners to identify a statutory or constitutional infraction that would enable them to prevail on the merits.

The Court did not decide the merits of the petitions, although in a footnote the majority opined that “Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” The opinion left to lower courts such issues as whether the detentions are authorized by Congress,

³¹ *Rasul*, 542 U.S. at 475 (citing *Eisentrager*, 339 U.S. at 777).

³² 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

³³ 28 U.S.C. § 1330 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

³⁴ *Rasul*, 542 U.S. at 484 (“nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts”).

³⁵ The Court noted that “*Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners’ *constitutional* entitlement to *habeas corpus*.” *Rasul*, 542 U.S. at 476 (emphasis original).

³⁶ *Hamdan*, 548 U.S. at 626 (characterizing the *Eisentrager* decision, 339 U.S. 763, 790(1950), as having rejected the treaty claim “on the merits”). Justice Kennedy’s *Boumediene* opinion rejected the view that *Eisentrager* imposed a strict jurisdictional test based solely on the sovereignty of the territory involved, finding instead that all of the “practical considerations” considered in the opinion were integral to the ultimate holding. *Boumediene*, 128 S.Ct. at 2257.

who may be detained and what evidence might be adduced to determine whether a person is an enemy combatant, or whether the Geneva Conventions afford the detainees any protections. The Court did not address the extent to which Congress might alter federal court jurisdiction over detainees' *habeas* petitions, but *Boumediene* appears to foreclose the option of eliminating it completely, at least without an adequate substitute procedure. This issue is discussed more fully below.

Combatant Status Review Tribunals

In response to Supreme Court decisions in 2004 related to "enemy combatants," the Pentagon established procedures for Combatant Status Review Tribunals (CSRTs), based on the procedures the Army uses to determine POW status during traditional wars.³⁷ Detainees who are determined not to be enemy combatants are to be transferred to their country of citizenship or otherwise dealt with "consistent with domestic and international obligations and U.S. foreign policy."³⁸ CSRTs confirmed the status of at least 520 enemy combatants. Any new detainees that might be transported to Guantanamo Bay would go before a CSRT. The CSRTs are not empowered to determine whether the enemy combatants are unlawful or lawful, which led two military commission judges to hold that CSRT determinations are inadequate to form the basis for the jurisdiction of military commissions.³⁹ Military commissions must now determine whether a defendant is an unlawful enemy combatant in order to assume jurisdiction.⁴⁰

CSRTs are administrative rather than adversarial, but each detainee has an opportunity to present "reasonably available" evidence and witnesses⁴¹ to a panel of three commissioned officers to try to demonstrate that the detainee does not meet the criteria to be designated as an "enemy combatant," defined as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition

³⁷ See Department of Defense (DOD) Fact Sheet, "Combatant Status Review Tribunals," available at <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva Conventions and prescribes their treatment in accordance with international law. It does not include a category for "unlawful" or "enemy" combatants, who would presumably be covered by the other categories.

³⁸ See DOD Press Release, "Combatant Status Review Tribunal Order Issued" (June 7, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>; Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, July 7, 2004 (hereinafter "CSRT Order"), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Memorandum from Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunals Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006 (hereinafter "CSRT Implementing Directive"), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

³⁹ See Josh White and Shailagh Murray, *Guantanamo Ruling Renews The Debate Over Detainees*, WASH. POST, June 6, 2007, at A3.

⁴⁰ United States v. Khadr, No. 07-001, (U.S.C.M.C.R. September 7, 2007) (finding CSRT designation alone insufficient to confer jurisdiction on military commission, but holding that the military commission judge has the inherent authority to determine the status of the accused). The Military Commissions Act of 2009 amended the MCA accordingly. See 10 U.S.C. § 948d ("A military commission is a competent tribunal to make a finding sufficient for jurisdiction.").

⁴¹ Witnesses from within the U.S. Armed Forces are not "reasonably available" if their participation, as determined by their commanders, would adversely affect combat or support operations. CSRT Implementing Directive, *supra* footnote 38, at encl. 1, para. G(9)(a). All other witnesses, apparently including those from other agencies, are not "reasonably available" if they decline to attend or cannot be reached, or if security considerations prevents their presence. *Id.* at encl. 1, para. G(9)(b). It is unclear who makes the security determination. Non-government witnesses appear at their own expense. Testimony is under oath and may be provided in writing or by telephone or video.

partners[,] ... [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”⁴² Each detainee is represented by a military officer (not a member of the Judge Advocate General (“JAG”) Corps)⁴³ and may elect to participate in the hearing or remain silent.⁴⁴ The government’s evidence is presented by the recorder, who is a military officer, preferably a judge advocate.⁴⁵

The CSRTs are not bound by the rules of evidence that would apply in court, and the government’s evidence is presumed to be “genuine and accurate.”⁴⁶ The government is required to present all of its relevant evidence, including evidence that tends to negate the detainee’s designation, to the tribunal.⁴⁷ The CSRT is required to assess, “to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement.”⁴⁸ Unclassified summaries of relevant evidence may be provided to the detainee.⁴⁹ The detainee’s personal representative may view classified information and comment on it to the tribunal to aid in its determination⁵⁰ but does not act as an advocate for the detainee.⁵¹ If the tribunal determines that the preponderance of the evidence is insufficient to support a continued designation as “enemy combatant” and its recommendation is approved through the chain of command, the detainee will be informed of that decision upon finalization of transportation arrangements (or earlier, if the task force commander deems it appropriate).⁵²

In March 2002, the Pentagon announced plans to create a separate process for periodically reviewing the status of detainees.⁵³ The process, similar to the CSRT process, affords persons detained at Guantanamo Bay the opportunity to present to a review board, on at least an annual basis while hostilities are ongoing, information to show that the detainee is no longer a threat or that it is in the interest of the United States and its allies to release the prisoner. If new

⁴² CSRT Order, *supra* footnote 38, at 1.

⁴³ CSRT Implementing Directive, *supra* footnote 38, at encl. 1, para. B.

⁴⁴ *Id.* at encl. 1, para. F.

⁴⁵ *Id* at encl. 1, para. C(2). In an affidavit submitted in DTA litigation, the government acknowledged that it has not utilized the procedures set forth in the CSRT Implementing Directive. *See* Bismullah v. Gates, 501 F.3d 178, 194-95 (D.C. Cir. 2007) (order on motions) (Rogers, J. Concurring) (citing differences between written procedures and those described by Rear Admiral James M. McGarrah in the *Boumediene* case). Rather than having a JAG officer in the rank of O-3 or above compile government information, the Department of Defense has utilized research, collection, and coordination teams to gather information to be assessed by a “case writer” who has “received approximately two weeks of training.” *Id.* at 94. Thus, the reporter assigned to represent the government’s case may not have had access to all government information.

⁴⁶ CSRT Implementing Directive, *supra* footnote 38 , at encl. 1, para. G(7) & (11).

⁴⁷ *Id.* at encl. 1, para. G(8).

⁴⁸ *Id.* at encl. 10.

⁴⁹ *Id.* at encl. 1, para. E(3)(a).

⁵⁰ *Id.* at encl. 1, para. H(7).

⁵¹ *Id.* at encl. 2, para. D (the personal representative is required to explain to the represented detainee that he or she is neither the attorney or advocate for the detainee, and that any information provided by the detainee is not confidential).

⁵² *Id.* at encl. 1, para. I(9)-(10).

⁵³ *See* DOD Press Release, “DoD Announces Draft Detainee Review Policy” (March 3, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040303-0403.html>; Memorandum from Deputy Secretary of Defense, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Navy Base, Guantanamo Bay, Cuba (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

information with a bearing on the detainee’s classification as an “enemy combatant” comes to light, a new CSRT may be ordered using the same procedures as described above.⁵⁴ The detainee’s State of nationality may be allowed, national security concerns permitting, to submit information on behalf of its national.

Pre-*Boumediene v. Bush* Court Challenges to the Detention Policy

While the Supreme Court clarified in *Rasul* (and later *Boumediene*, discussed *infra*) that detainees presently held at Guantanamo have recourse to federal courts to challenge their detention, the extent to which they may enforce any rights they may have under the Geneva Conventions and other law continues to remain unclear. Prior to the enactment of the DTA provisions eliminating *habeas* review, the Justice Department argued primarily that *Rasul v. Bush* merely decided the issue of jurisdiction, but that the 1950 Supreme Court decision in *Johnson v. Eisentrager*⁵⁵ remained applicable to limit the relief to which the detainees may be entitled. While more than one district judge from the D.C. Circuit agreed,⁵⁶ others did not, holding for example that detainees have the right to the assistance of an attorney.⁵⁷ One judge found that a detainee has the right to be treated as a POW until a “competent tribunal” decides otherwise,⁵⁸ but the appellate court reversed. The following sections summarize the three most important decisions prior to the enactment of the 2006 MCA, including the cases that eventually reached the Supreme Court as *Boumediene v. Bush* and *Hamdan v. Rumsfeld*. The Court of Appeals for the D.C. Circuit had ordered these cases dismissed for lack of jurisdiction on the basis of the MCA,⁵⁹ but the Supreme Court reversed in both its *Hamdan* and *Boumediene* decisions, returning the cases to the district court for consideration on the merits. Also discussed is a Fourth Circuit case involving an alien, al-Marri, arrested in the United States and subsequently held in military custody as an enemy combatant. The Supreme Court initially granted certiorari to review the appellate court’s decision.⁶⁰ However, before the Court could consider the merits of the case, the government requested that the Court authorize al-Marri’s release from military custody and transfer to civilian authorities to face criminal charges. The Court granted the government’s request, vacated the appellate court’s earlier judgment, and transferred the case back to the lower court with orders to dismiss it as moot.

⁵⁴ CSRT Implementing Directive, *supra* footnote 38, at encl. 10 (implementing Detainee Treatment Act provisions).

⁵⁵ 339 U.S. 763 (1950) (holding that the federal courts did not have jurisdiction to hear a petition on behalf of German citizens who had been convicted by U.S. military commissions in China because the writ of *habeas corpus* was not available to “enemy alien[s], who at no relevant time and in no stage of [their] captivity [have] been within [the court’s] jurisdiction”).

⁵⁶ *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005); *Hamdan v. Rumsfed*, 464 F. Supp.2d 9 (D.D.C. 2006).

⁵⁷ *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004).

⁵⁸ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev’d* 415 F.3d 33 (D.C. Cir.), *rev’d* 548 U.S. 557 (2006).

⁵⁹ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

⁶⁰ 129 S.Ct. 680 (U.S. 2008). Al-Marri also petitioned separately for relief from certain conditions of detention. *Al-Marri v. Gates*, Case No. 05-2259 (D.S.C. filed March 13, 2008). In March 2009, shortly after his transfer to civilian custody, Al-Marri filed with the court a notice of voluntary dismissal of the case.

***Khalid v. Bush*⁶¹**

Seven detainees, all of whom had been captured outside of Afghanistan, sought relief from their detention at the Guantanamo Bay facility. U.S. District Judge Richard J. Leon agreed with the Bush Administration that Congress, pursuant to the 2001 AUMF, granted the President the authority to detain foreign enemy combatants outside the United States for the duration of the war against Al Qaeda and the Taliban, and that the courts have virtually no power to review the conditions under which such prisoners are held. Noting that the prisoners had been captured and detained pursuant to the President Bush's military order,⁶² Judge Leon agreed with the government that "(1) non-resident aliens detained under [such] circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances."⁶³

Judge Leon rejected the petitioners' contention that their arrest outside of Afghanistan and away from any active battlefield meant that they could not be "enemy combatants" within the meaning of the law of war, finding instead that the AUMF contains no geographical boundaries,⁶⁴ and gives the President virtually unlimited authority to exercise his war power wherever enemy combatants are found.⁶⁵ The circumstances behind the off-battlefield captures did, however, apparently preclude the petitioners from claiming their detentions violate the Geneva Conventions.⁶⁶ Other treaties put forth by the petitioners were found to be unavailing because of their non-self-executing nature.⁶⁷

The court declined to evaluate whether the conditions of detention were unlawful. Judge Leon concluded that "[w]hile a state of war does not give the President a 'blank check,' and the courts must have some role when individual liberty is at stake, any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens."⁶⁸ He dismissed all seven petitions, ruling that "until Congress and the President act

⁶¹ 355 F. Supp. 2d 311 (D.D.C. 2005), *vacated and dismissed sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd* 553 U.S. __, 128 S.Ct. 2229 (2008).

⁶² Although the MO authorized detention as well as trial by military commissions, only fifteen of the detainees were formally designated as subject to the MO.

⁶³ 355 F. Supp. 2d at 314.

⁶⁴ *Id.* at 320.

⁶⁵ *Id.* at 318. Judge Leon wrote:

The President's ability to make the decisions necessary to effectively prosecute a Congressionally authorized armed conflict must be interpreted expansively. Indeed, the Constitution does not delegate to Congress the power to "conduct" or to "make" war; rather, Congress has been given the power to "declare" war. This critical distinction lends considerable support to the President's authority to make the operational and tactical decisions necessary during an ongoing conflict. Moreover, there can be no doubt that the President's power to act at a time of armed conflict is at its strongest when Congress has specifically authorized the President to act.

⁶⁶ *Id.* at 326.

⁶⁷ *Id.* at 327. It may be argued that the *habeas* statute itself (28 U.S.C. § 2241), which authorizes challenges of detention based on treaty violations, provided a means for private enforcement, at least prior to its amendment by the 2006 MCA. See *Eisentrager*, 339 U.S. at 789 (while noting that the 1929 Geneva Convention did not provide for private enforcement, considering but rejecting the *habeas* claim that the treaty vitiated jurisdiction of military commission).

⁶⁸ *Id.* at 330 (citations omitted).

further, there is ... no viable legal theory under international law by which a federal court could issue a writ.”

On appeal, the *Khalid* case was consolidated with *In re Guantanamo Detainee Cases* as *Boumediene v. Bush*.

In re Guantanamo Detainee Cases⁶⁹

U.S. District Judge Joyce Hens Green interpreted *Rasul* more broadly, finding that the detainees do have rights under the U.S. Constitution and international treaties, and thus denied the government’s motion to dismiss the eleven challenges before the court. Specifically, Judge Green held that the detainees are entitled to due process of law under the Fifth Amendment, and that the CSRT procedures do not meet that standard. Interpreting the history of Supreme Court rulings on the availability of constitutional rights in territories under the control of the American government (though not part of its sovereign territory), Judge Green concluded that the inquiry turns on the fundamental nature of the constitutional rights being asserted rather than the citizenship of the person asserting them. Accepting that the right not to be deprived of liberty without due process of law is a fundamental constitutional right, the judge applied a balancing test to determine what process is due in light of the government’s significant interest in safeguarding national security.⁷⁰ Judge Green rejected the government’s stance that the CSRTs provided more than sufficient due process for the detainees. Instead, she identified two categories of defects. She objected to the CSRTs’ failure to provide the detainees with access to material evidence upon which the tribunal affirmed their “enemy combatant” status and the failure to permit the assistance of counsel to compensate for the lack of access. These circumstances, she said, deprived detainees of a meaningful opportunity to challenge the evidence against them.

Second, in particular cases, the judge found that the CSRTs’ handling of accusations of torture and the vague and potentially overbroad definition of “enemy combatant” could violate the due process rights of detainees. Citing detainees’ statements and news reports of abuse, Judge Green noted that the possibility that evidence was obtained involuntarily from the accused or from other witnesses, whether by interrogators at Guantanamo or by foreign intelligence officials elsewhere, could make such evidence unreliable and thus constitutionally inadmissible as a basis on which to determine whether a detainee is an enemy combatant. Judge Green objected to the definition of “enemy combatant” because it appears to cover “individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies.” She noted that government counsel had, in response to a set of hypothetical questions, stated that the following could be treated as enemy combatants under the AUMF: “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.”⁷¹ Judge Green stated that the indefinite detention of a person solely because of his contacts with individuals or organizations tied to terrorism, and not due to any direct

⁶⁹ 355 F. Supp. 2d 443 (D.D.C. 2005), *vacated and dismissed sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d* *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008).

⁷⁰ *Id.* at 465 (citing *Hamdi v. Rumsfeld*).

⁷¹ *Id.* at 475 (internal citations omitted).

involvement in terrorist activities, would violate due process even if such detention were found to be authorized by the AUMF.⁷²

This case was consolidated with the *Khalid* decision and heard as *Boumediene v. Bush* by the D.C. Circuit Court of Appeals, and on appeal, the Supreme Court.

Hamdan v. Rumsfeld

Salim Ahmed Hamdan, who was captured in Afghanistan and is alleged to have worked for Osama Bin Laden as a bodyguard and driver, brought this challenge to the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission,⁷³ arguing that the military commission rules and procedures were inconsistent with the UCMJ⁷⁴ and that he had the right to be treated as a prisoner of war under the Geneva Conventions.⁷⁵ U.S. District Judge Robertson agreed, finding no inherent authority in the President as Commander-in-Chief of the Armed Forces to create such tribunals outside of the existing statutory authority, with which the military commission rules did not comply. He also concluded that the Geneva Conventions apply to the whole of the conflict in Afghanistan, including under their protections all persons detained in connection with the hostilities there,⁷⁶ and that Hamdan was thus entitled to be treated as a prisoner of war until his status was determined to be otherwise by a competent tribunal, in accordance with article 5 of the Third Geneva Convention (prisoners of war).

The D.C. Circuit Court of Appeals reversed, ruling that the Geneva Conventions are not judicially enforceable. Judge Williams wrote a concurring opinion, construing Common Article 3 to apply to any conflict with a non-state actor,⁷⁷ without regard to the geographical confinement of such a conflict within the borders of a signatory state. The Circuit Court interpreted the UCMJ language to mean that military commission rules have only to be consistent with those articles of the UCMJ that refer specifically to military commissions, and therefore need not be uniform with the rules that apply to courts-martial. After the appellate court decision was handed down, Congress passed the DTA, which revoked federal court jurisdiction to hear *habeas corpus* petitions and other causes of action brought by Guantanamo detainees. (The provisions of the DTA are discussed in greater detail *infra*.) The Supreme Court nevertheless granted review and reversed.

Jurisdiction

Before reaching the merits of the case, the Supreme Court declined to accept the government's argument that Congress, by passing the DTA, had stripped the Court of its jurisdiction to review *habeas corpus* challenges by or on behalf of Guantanamo detainees whose petitions had already been filed.⁷⁸ The Court also declined to dismiss the appeal as urged by the government on the

⁷² *Id.* at 476.

⁷³ 344 F. Supp. 2d 152 (D.D.C. 2004), 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557 (2006).

⁷⁴ 10 U.S.C. §§ 801, *et seq.*

⁷⁵ There are four Conventions, the most relevant of which is The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter "GPW").

⁷⁶ 344 F. Supp. 2d at 161.

⁷⁷ GPW art. 3. For a discussion of Common Article 3, see CRS Report RL31367, *Treatment of "Battlefield Detainees" in the War on Terrorism*, by Jennifer K. Elsea.

⁷⁸ *Hamdan*, 548 U.S. at 583-584. To resolve the question, the majority employed canons of statutory interpretation (continued...)

basis that federal courts should abstain from intervening in cases before military tribunals that have not been finally decided,⁷⁹ noting the dissimilarities between military commission trials and ordinary courts-martial of service members pursuant to procedures established by Congress.⁸⁰ The government's argument that the petitioner had no rights conferred by the Geneva Conventions that could be adjudicated in federal court likewise did not persuade the Court to dismiss the case. Regardless of whether the Geneva Conventions provide rights enforceable in Article III courts, the Court found that Congress, by incorporating the "law of war" into UCMJ article 21,⁸¹ brought the Geneva Conventions within the scope of law to be applied by courts. Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court's review.

Presidential Authority

With respect to the authority to create the military commissions, the Court held that any power to create them must flow from the Constitution and must be among those "powers granted jointly to the President and Congress in time of war."⁸² It disagreed with the government's position that Congress had authorized the commissions either when it passed the AUMF⁸³ or the DTA. Although the Court assumed that the AUMF activated the President's war powers, it did not view the AUMF as expanding the President's powers beyond the authorization set forth in the UCMJ. The Court also noted that the DTA, while recognizing the existence of military commissions, does not specifically authorize them. At most, these statutes "acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war."⁸⁴

The Geneva Conventions and the Law of War

The *habeas corpus* statute permits those detained under U.S. authority to challenge their detention on the basis that it violates any statute, the Constitution, or a treaty.⁸⁵ The D.C. Circuit nevertheless held that the Geneva Conventions are never enforceable in federal courts.⁸⁶ The

(...continued)

supplemented by legislative history, avoiding the question of whether the withdrawal of the Court's jurisdiction would constitute a suspension of the Writ of Habeas Corpus, or whether it would amount to impermissible "court-stripping." Justice Scalia, joined by Justices Alito and Thomas in his dissent, interpreted the DTA as a revocation of jurisdiction.

⁷⁹ *Id.* at 577-578. The court below had also rejected this argument, 413 F.3d 33, 36 (D.C. Cir. 2005).

⁸⁰ See *id.* (stating that the bodies established by the Department of Defense to review the decisions of military commissions "clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces....").

⁸¹ 10 U.S.C. § 821 ("The provisions of [the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.")

⁸² *Hamdan*, 548 U.S. at 591 (citing Congress's powers to "declare War ... and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," *Id.*, cl. 12, to "define and punish ... Offences against the Law of Nations," *Id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *Id.*, cl. 14.).

⁸³ P.L. 107-40, 115 Stat. 224 (2001).

⁸⁴ *Hamdan*, 548 U.S. at 594-595.

⁸⁵ 28 U.S.C. § 2241(c)(3)(permitting petitions by prisoners "in custody in violation of the Constitution or laws or treaties of the United States").

⁸⁶ See 415 F.3d at 39 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789, n. 14(1950)).

Supreme Court disagreed, finding the Conventions were applicable as incorporated by UCMJ Article 21, because “compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”⁸⁷ In response to the alternative holding by the court below that Hamdan, as a putative member of Al Qaeda, was not entitled to any of the protections accorded by the Geneva Conventions, the Court concluded that Common Article 3 of the Geneva Conventions applies even to members of Al Qaeda, according to them a minimum baseline of protections, including protection from the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁸⁸

While recognizing that Common Article 3 “obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict,” and that “its requirements are general ones, crafted to accommodate a wide variety of legal systems,” the Court found that the military commissions under M.C.O. No. 1 did not meet these criteria. In particular, the military commissions did not qualify as “regularly constituted” because they deviated too far, in the Court’s view, from the rules that apply to courts-martial, without a satisfactory explanation of the need for such deviation.⁸⁹ Justice Alito, joined by Justices Scalia and Thomas, dissented, arguing that the Court is bound to defer to the President’s plausible interpretation of the treaty language.

Analysis

While the *Hamdan* Court declared the military commissions as constituted under the President Bush’s Military Order to be “illegal,” it left open the possibility that changes to the military commission rules could cure any defects by bringing them within the law of war and conformity with the UCMJ, or by asking Congress to authorize or craft rules tailored to the armed conflict it authorized against those responsible for the 9/11 terrorist attacks. The Court did not resolve the extent to which the detainees, as aliens held outside of U.S. territory, have constitutional rights enforceable in federal court.

The decision may affect the treatment of detainees outside of their criminal trials; for example, in interrogations for intelligence purposes. Common Article 3 of the Geneva Conventions mandates that all persons taking no active part in hostilities, including those who have laid down their arms or been incapacitated by capture or injury, are to be treated humanely and protected from “violence to life and person,” torture, and “outrages upon personal dignity, in particular, humiliating and degrading treatment.” Insofar as these protections are incorporated in the UCMJ and other laws, it would seem the Court is ready to interpret and adjudicate them, to the extent it retains jurisdiction to do so. It is not clear how the Court views the scope of the relevant armed conflict, however, because its decisions on the merits have been limited to cases arising out of hostilities in Afghanistan.

⁸⁷ *Hamdan*, 548 U.S. at 628.

⁸⁸ GPW art. 3 § 1(d). The identical provision is included in each of the four Geneva Conventions and applies to any “conflict not of an international character.” The majority declined to accept the President’s interpretation of Common Article 3 as inapplicable to the conflict with Al Qaeda and interpreted the phrase “in contradistinction to a conflict between nations,” which the Geneva Conventions designate a “conflict of international character”. *Hamdan*, 548 U.S. at 630.

⁸⁹ *Id.* at 633-634 (plurality opinion); *id.* (Kennedy, J., concurring) at 651. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, further based their conclusion on the basis that M.C.O. No. 1 did not meet all criteria of art. 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). While the United States is not party to Protocol I, the plurality noted that many authorities regard it as customary international law.

The opinion reaffirms the holding in *Rasul v. Bush*⁹⁰ that the AUMF does not provide the President a “blank check,” and, by finding in favor of a noncitizen held overseas, seems to have extended to non-citizens the *Hamdi* comment that

[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.⁹¹

The dissenting views also relied in good measure on actions taken by Congress, seemingly repudiating the view expressed earlier by the Executive that any efforts by Congress to legislate with respect to persons captured, detained, and possibly tried in connection with the armed conflict would be an unconstitutional intrusion into powers held exclusively by the President.⁹² Expressly or implicitly, all eight participating Justices applied the framework set forth by Justice Jackson in his famous concurrence in the *Steel Seizures* case,⁹³ which accords greater deference to the President in cases involving national security where he acts with express congressional authority than when he acts alone. The differing views among the Justices seem to have been a function of their interpretation of the AUMF and other acts of Congress as condoning or limiting executive actions.⁹⁴ The Military Commissions Act of 2006 likely resolves many issues regarding the scope of the President’s authority to try detainees by military commission; however, the constitutionality of the various measures remains to be resolved.

Al-Marri

The case of Ali Saleh Kahlah al-Marri differs significantly from cases discussed above in that the petitioner, a lawful alien resident, was arrested and imprisoned within the United States. Whether a person in his position may lawfully be detained pursuant to the AUMF has not been fully resolved. The issue divided the Fourth Circuit, which initially found in favor in the petitioner but then reversed *en banc*, only to have the Supreme Court vacate the *en banc* opinion after the government charged the petitioner with a federal crime and moved him into the ordinary criminal justice system. The following section describes the facts of the case and the issues that divided the courts, which may return to relevance, especially if congressional efforts are successful in making military commissions the sole forum for trying persons who meet the definition of persons triable under the Military Commissions Act, as amended.⁹⁵

Al-Marri, a Qatari student, was arrested in December 2001 in Peoria, IL, and transported to New York City, where he was held as a material witness for the grand jury investigating the 9/11 attacks. He was later charged with financial fraud and making false statements and transferred back to Peoria. Before his case went to trial, however, he was declared an “enemy combatant”

⁹⁰ 542 U.S. 466 (2004).

⁹¹ 542 U.S. 507, 535 (2004).

⁹² See, e.g., *Oversight of the Department of Justice: Hearing Before the Senate Judiciary Committee*, 107th Cong. (2002) (testimony of Attorney General John Ashcroft) (arguing that a statute that could be read to interfere with the executive power to detain enemy combatants must be interpreted otherwise to withstand constitutional scrutiny).

⁹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁹⁴ For information about relevant legislation, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

⁹⁵ See, e.g., H.R. 4111, H.R. 4463, H.R. 4415, and H.R. 4127 (111th Cong.).

and transferred to military custody in South Carolina. Al-Marri's counsel filed a petition for *habeas corpus* challenging al-Marri's designation and detention as an "enemy combatant." The petition was eventually dismissed for lack of jurisdiction by the U.S. Court of Appeals for the Seventh Circuit,⁹⁶ and a new petition was filed in the Fourth Circuit. In March 2005, Judge Floyd agreed with the government that the detention was authorized by the AUMF and transferred the case to a federal magistrate to examine the factual allegations supporting the government's detention of the petitioner as an enemy combatant.⁹⁷ The government provided a declaration asserting that al-Marri is closely associated with Al Qaeda and had been sent to the United States prior to September 11, 2001, to serve as a "sleeper agent" for Al Qaeda in order to "facilitate terrorist activities and explore disrupting this country's financial system through computer hacking."⁹⁸ The magistrate judge recommended the dismissal of the petition on the basis of information the government provided, which al-Marri did not attempt to rebut and which the magistrate judge concluded was sufficient for due process purposes in line with the *Hamdi* decision.⁹⁹ The district judge adopted the magistrate judge's report and recommendations in full, rejecting the petitioner's argument that his capture away from a foreign battlefield precluded his designation as an "enemy combatant."¹⁰⁰

Al-Marri appealed, and the government moved to dismiss on the basis that section 7 of the 2006 MCA stripped the court of jurisdiction. The petitioner asserted that Congress did not intend to deprive him of his right to *habeas* or that, alternatively, the MCA is unconstitutional. The majority of the appellate panel avoided the constitutional question by finding that al-Marri does not meet the statutory definition as an alien who "has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."¹⁰¹

⁹⁶ Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004), cert. denied 543 U.S. 809 (2004).

⁹⁷ Al-Marri v. Hanft, 378 F. Supp.2d 673 (D. S.C. 2005) (order denying summary judgment).

⁹⁸ Al-Marri v. Pucciarelli, 534 F.3d 213, 220 (4th Cir. 2008)(Motz, J., concurring)(citing declaration Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism).

⁹⁹ Al-Marri v. Wright, 443 F. Supp. 2d 774 (D. S.C. 2006) (citing *Hamdi* v. Rumsfeld, 542 U.S. 507 (2004)). With respect to the "due process hearing" required to establish that an enemy combatant is properly held, the *Hamdi* plurality stated that:

enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

¹⁰⁰ *Id.* at 778-80.

¹⁰¹ The court held that the 2006 MCA requires a two-step process for determining whether persons are properly detained as enemy combatants, but that the President's determination of the petitioner's "enemy combatant" status fulfilled only the first step. The court next found that al-Marri could not be said to be awaiting such a determination within the meaning of the MCA, inasmuch as the government was arguing on the merits that the presidential determination had provided all of the process that was due, and the government had offered the possibility of bringing al-Marri before a CSRT only as an alternative course of action in the event the petition were dismissed. Further, the majority looked to the legislative history of the MCA, from which it divined that Congress did not intend to replace *habeas* review with the truncated review available under the amended DTA in the case of aliens within the United States, who it understood to have a constitutional as opposed to merely statutory entitlement to seek *habeas* review. Al-Marri v. Wright , 487 F.3d 160, 172 (4th Cir. 2007), vacated *sub nom.* Al-Marri v. Pucciarelli, 534 F.3d 213 (2008)(*per curiam*).

Turning to the merits, the majority found that al-Marri does not fall within the legal category of “enemy combatant” within the meaning of *Hamdi*, and that the government could continue to hold him only if it charges him with a crime, commences deportation proceedings, obtains a material witness warrant in connection with grand jury proceedings, or detains him for a limited time pursuant to the USA PATRIOT Act.¹⁰² In so holding, the majority rejected the government’s contention that the AUMF authorizes the President to order the military to seize and detain persons within the United States under the facts asserted by the government, or that, alternatively, the President has inherent constitutional authority to order the detention.

The government cited the *Hamdi* decision and the Fourth Circuit’s decision in *Padilla v. Hanft*¹⁰³ to support its contention that al-Marri is an enemy combatant within the meaning of the AUMF and the law of war. The court, however, interpreted *Hamdi* as confirming only that “the AUMF is explicit congressional authorization for the detention of individuals in the *narrow category* ... [of] individuals who were ‘part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.’”¹⁰⁴ Likewise, Padilla, although captured in the United States, could be detained pursuant to the AUMF only because he had been, prior to returning to the United States, “‘armed and present in a combat zone’ in Afghanistan as part of Taliban forces during the conflict there with the United States.”¹⁰⁵ The court explained that the two cases cited by the government, *Hamdi* and *Padilla*, involved situations similar to the World War II case *Ex parte Quirin*,¹⁰⁶ in which the Supreme Court agreed that eight German saboteurs could be tried by military commission because they were enemy belligerents within the meaning of the law of war.¹⁰⁷ In contrast, al-Marri’s situation was to be likened to *Ex parte Milligan*,¹⁰⁸ the Civil War case in which the Supreme Court held that a citizen of Indiana accused of conspiring to commit hostile acts against the Union was nevertheless a civilian who was not amenable to military jurisdiction.¹⁰⁹ The court concluded that enemy combatant status rests, in accordance with the law of war, on affiliation with the military arm of an enemy government in an international armed conflict.

Judge Hudson dissented, arguing that the broad language of the AUMF, which authorized the President “to use all necessary and appropriate force against those nations, *organizations, or persons* he determines” were involved in the terrorist attacks of September 11, 2001, “would certainly seem to embrace surreptitious al Qaeda agents operating within the continental United States.”¹¹⁰ He would have found no meaningful distinction between the present case and *Padilla*.

¹⁰² *Id.* at 196.

¹⁰³ 423 F.3d 386 (4th Cir. 2005). The government is no longer holding Jose Padilla as an enemy combatant, having turned him over to civil authorities for trial on charges associated with terrorism.

¹⁰⁴ *Al-Marri*, 487 F.3d at 180 (citing *Hamdi*, 542 U.S. at 516-17)(emphasis in original).

¹⁰⁵ *Id.* (citing *Padilla*, 423 F.3d at 390-91).

¹⁰⁶ 317 U.S. 1 (1942).

¹⁰⁷ *Al-Marri*, 487 F.3d at 179 (citing *Quirin*, 317 U.S. at 37-38; *Hamdi*, 542 U.S. at 519; *Padilla*, 423 F.3d at 391).

¹⁰⁸ 71 U.S. (4 Wall.) 2 (1866).

¹⁰⁹ *Al-Marri*, 487 F.3d at 189.

¹¹⁰ *Id.* at 196 (Hudson, J., dissenting).

The government petitioned for and was granted a rehearing *en banc*.¹¹¹ On rehearing, the narrowly divided Fourth Circuit full bench rejected the earlier panel's decision in favor of the government's position that al-Marri fit the legal definition of "enemy combatant," but also reversed the district court's decision that al-Marri was not entitled to present any more evidence to refute the government's case against him. Four of the judges on the panel would have retained the earlier decision, arguing that it was not within the court's power to expand the definition of "enemy combatant" beyond the law-of-war principles at the heart of the Supreme Court's *Hamdi* decision.¹¹² However, these four judges joined in Judge Traxler's opinion to remand for evidentiary proceedings in order "at least [to] place the burden on the Government to make an initial showing that normal due process protections are unduly burdensome and that the Rapp declaration is 'the most reliable available evidence,' supporting the Government's allegations before it may order al-Marri's military detention."¹¹³

Judge Traxler, whose opinion is controlling for the case although not joined in full by any other panel member, agreed with the four dissenting judges that the AUMF "grants the President the power to detain enemy combatants in the war against al Qaeda, including belligerents who enter our country for the purpose of committing hostile and war-like acts such as those carried out by the al Qaeda operatives on 9/11."¹¹⁴ Accordingly, he would define "enemy combatant" in the present terrorism-related hostilities to include persons who "associate themselves with al Qaeda" and travel to the United States "for the avowed purpose of further prosecuting that war on American soil, ... even though the government cannot establish that the combatant also 'took up arms on behalf of that enemy and against our country in a foreign combat zone of that war.'"¹¹⁵ Under this definition, American citizens arrested in the United States could also be treated as

¹¹¹ *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008)(*per curiam*). The intervening Supreme Court decision in *Boumediene* led the court to reject the government's contention that the 2006 MCA had divested the court of jurisdiction.

¹¹² *Id.* at 227-232 (Motz, J. concurring)(citing *Hamdi*, 542 U.S. at 518). Judge Motz, joined by three other judges, characterized leading precedents as sharing two characteristics:

- (1) they look to law-of-war principles to determine who fits within the "legal category" of enemy combatant; and
- (2) following the law of war, they rest enemy combatant status on affiliation with the military arm of an enemy nation.

Under their interpretation of the law of war, there is no combatant status in non-international armed conflict, where detention is controlled by domestic law. For a discussion of U.S. practice with respect to the wartime detention of suspected enemies, whether civilians or combatants, see CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea.

¹¹³ *Al-Marri*, 534 F.3d at 553 (Motz, J. concurring).

¹¹⁴ *Id.* at 253-254 (Traxler, J., concurring).

¹¹⁵ *Id.* at 258-259 (Traxler, J., concurring). Judge Traxler further suggested that the types of activities that would distinguish a combatant from a civilian enemy would include violent activities. *See id.* at 261 (describing the allegations that al-Marri "directly allied himself with al Qaeda abroad, volunteered for assignments (including a martyr mission), received training and funding from al Qaeda abroad, was dispatched by al Qaeda to the United States as an al Qaeda operative with orders to serve as a sleeper agent, and was tasked with facilitating and ultimately committing terrorist attacks against the United States within this country"). The dissenting judges suggested similar definitions for determining who may be treated as an "enemy combatant." *See id.* at 285 (Williams, J., concurring in part and dissenting in part)(defining enemy combatant covered by the AUMF as "an individual who meets two criteria: (1) he attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force"); *id.* at 323-324 (Wilkinson, J., concurring in part and dissenting in part)(proposing two-part test in which "an 'enemy' is any individual who is (1) a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force" and a combatant is "a person who knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of an enemy nation or organization").

enemy combatants under similar allegations,¹¹⁶ at least if they had traveled abroad and returned for the purpose of engaging in activity related to terrorism on behalf of Al Qaeda.

However, Judge Traxler did not agree that al-Marri had been afforded due process by the district court to challenge the factual basis for his designation as an enemy combatant. While recognizing that the *Hamdi* plurality had suggested that hearsay evidence might be adequate to satisfy due process requirements for proving enemy combatant status, Judge Traxler did not agree that such relaxed evidentiary standards are necessarily appropriate when dealing with a person arrested in the United States:

Because al-Marri was seized and detained in this country,... he is entitled to habeas review by a civilian judicial court and to the due process protections granted by our Constitution, interpreted and applied in the context of the facts, interests, and burdens at hand. To determine what constitutional process al-Marri is due, the court must weigh the competing interests, and the burden-shifting scheme and relaxed evidentiary standards discussed in *Hamdi* serve as important guides in this endeavor. *Hamdi* does not, however, provide a cookie-cutter procedure appropriate for every alleged enemy-combatant, regardless of the circumstances of the alleged combatant's seizure or the actual burdens the government might face in defending the habeas petition in the normal way.¹¹⁷

In December 2008, the Supreme Court agreed to hear an appeal of the *Al-Marri* ruling,¹¹⁸ potentially setting the stage for the Court to make a definitive pronouncement regarding the President's authority to militarily detain terrorist suspects apprehended away from the Afghan battlefield. However, on January 22, 2009, President Obama instructed the Attorney General, Secretary of Defense, and other designated officials to review the factual and legal basis for al-Marri's continued detention as an enemy combatant, and "identify and thoroughly evaluate alternative dispositions."¹¹⁹ This review culminated in criminal charges being brought against al-Marri in the U.S. District Court for the Central District of Illinois, alleging that al-Marri provided material support to Al Qaeda and had conspired with others to provide material support to Al Qaeda.¹²⁰ The United States thereafter moved for the Supreme Court to dismiss al-Marri's appeal as moot and authorize his transfer from military to civilian custody pending his criminal trial. On March 6, 2009, the Court granted the government's application concerning the transfer of al-Marri to civilian custody. It vacated the Fourth Circuit's judgment and remanded the case back to the appellate court with instructions to dismiss the case as moot.¹²¹ Accordingly, the appellate court's earlier decision regarding the President's authority to detain terrorist suspects captured within the United States is no longer binding precedent in the Fourth Circuit. Al-Marri thereafter

¹¹⁶ See *id.* at 279-280 (Gregory, J., concurring).

¹¹⁷ *Id.* at 272. Judge Traxler formulated a general rule under which such enemy combatants "would be entitled to the normal due process protections available to all within this country, including an opportunity to confront and question witnesses against him[, unless] the government can demonstrate to the satisfaction of the district court that this is impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government to produce non-hearsay evidence and accede to discovery requests, [in which case] alternatives should be considered and employed." *Id.* at 273.

¹¹⁸ 129 S.Ct. 680 (2008).

¹¹⁹ Memorandum from President Barack Obama to the Attorney General and Other Officials, "Review of the Detention of Ali Saleh Kahlah al-Marri," January 22, 2009, available at http://www.whitehouse.gov/the_press_office/ReviewoftheDetentionofAliSalehKahlah/ (hereinafter "al-Marri Memo").

¹²⁰ Department of Justice, "Ali Al-Marri Indicted for Providing Material Support to Al-Qaeda," press release, February 27, 2009, <http://www.usdoj.gov/opa/pr/2009/February/09-ag-177.html>.

¹²¹ *Al-Marri v. Spagone*, 129 S.Ct. 1545 (U.S. 2009).

pled guilty in federal civilian court to one count of conspiracy to provide material support to Al Qaeda.¹²²

The dismissal of al-Marri's case means that the President's legal authority to militarily detain terrorist suspects apprehended in the United States has not been definitively settled. Indeed, the transfer of al-Marri to civilian custody to face trial in federal civilian court means that the United States no longer holds any terrorist suspect in military detention who was apprehended in the United States. Whether circumstances will arise in the "war on terror" or some other military conflict that will compel the Supreme Court to more definitively address the President's military detention authority remains to be seen.

Detainee Treatment Act of 2005 (DTA)

The DTA, passed after the Court's 2004 decision in *Rasul*, requires uniform standards for interrogation of persons in the custody of the Department of Defense,¹²³ and expressly bans cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency.¹²⁴ The prohibited treatment is defined as that which would violate the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as the Senate has interpreted "cruel, inhuman, or degrading" treatment banned by the U.N. Convention Against Torture.¹²⁵ The provision does not create a cause of action for detainees to ask a court for relief based on inconsistent treatment, and it divests the courts of jurisdiction to hear challenges by those detained at Guantanamo Bay based on their treatment or living conditions.¹²⁶ It also provides a legal defense to U.S. officers and agents who may be sued or prosecuted based on their treatment or interrogation of detainees.¹²⁷ This language appears to have been added as a compromise because the Bush Administration reportedly sought to have the Central Intelligence Agency excepted from the prohibition on cruel, inhuman and degrading treatment on the grounds that the President needs "maximum flexibility in dealing with the global war on terrorism."¹²⁸

¹²² Department of Justice, "Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda," press release, April 30, 2009, <http://www.usdoj.gov/opa/pr/2009/April/09-nsd-415.html>.

¹²³ Section 1002 of P.L. 109-148 requires the DOD to follow the Army Field Manual for intelligence interrogation. See Department of the Army Field Manual 2-22.3 (FM 34-52), Human Intelligence Collector Operations (2006).

¹²⁴ Section 1003 of P.L. 109-148. See CRS Report RL33655, *Interrogation of Detainees: Requirements of the Detainee Treatment Act*, by Michael John Garcia.

¹²⁵ Section 1003(d) of P.L. 109-148. For more information, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

¹²⁶ Section 1005 of P.L. 109-148 (denying aliens in military custody privilege to file writ of *habeas corpus* or "any other action against the United States or its agents relating to any aspect of the[ir] detention ...").

¹²⁷ Section 1004 of P.L. 109-148 provides a defense in litigation related to "specific operational practices," involving detention and interrogation where the defendant:

did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.

¹²⁸ See Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, October 25, 2005, at 16.

The DTA also includes a modified version of the “Graham-Levin Amendment,”¹²⁹ which requires the Defense Department to submit to the Armed Services and Judiciary Committees the procedural rules for determining detainees’ status.¹³⁰ The amendment neither authorizes nor requires a formal status determination, but it does require that certain congressional committees be notified 30 days prior to the implementation of any changes to the rules. As initially adopted by the Senate, the amendment would have required these procedural rules to preclude evidence determined by the board or tribunal to have been obtained by undue coercion, however, the conferees modified the language so that the tribunal or board must assess, “to the extent practicable ... whether any statement derived from or relating to such detainee was obtained as a result of coercion” and “the probative value, if any, of any such statement.”

The Graham-Levin Amendment also eliminated the federal courts’ statutory jurisdiction over *habeas* claims by aliens detained at Guantanamo Bay, but provided for limited appeals of status determinations made pursuant to the DOD procedures for Combatant Status Review Tribunals (CSRTs). In June 2008, the Supreme Court invalidated the provision that eliminated *habeas corpus* jurisdiction, but stated that the DTA appellate process “remains intact,”¹³¹ although it appears that the process is not an adequate substitute for *habeas* review. However, it no longer constitutes the sole statutory avenue by which a detainee may seek judicial review of his detention. However, the D.C. Circuit held that the DTA appellate procedure is no longer good law, leaving *habeas* petitions as the only means of seeking review of detention.¹³²

Under the appellate process prescribed by the DTA, the D.C. Circuit Court of Appeals had exclusive jurisdiction to hear appeals of any status determination made by a “Designated Civilian Official,” but the review was limited to a consideration of whether the determination was made consistently with applicable DOD procedures, including whether it was supported by the preponderance of the evidence, but allowing a rebuttable presumption in favor of the government. Detainees were permitted to appeal status determinations on the basis that, “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” Jurisdiction was to cease if the detainee were transferred from DOD custody.¹³³

The DTA also provided for an appeal to the Court of Appeals for the District of Columbia Circuit of final sentences rendered by a military commission.¹³⁴ As initially enacted, the DTA required the court to review capital cases or cases in which the alien was sentenced to death or to a term of imprisonment for 10 years or more, and made review over convictions with lesser penalties discretionary.¹³⁵ The scope of review was limited to considering whether the decision applied the

¹²⁹ 151 CONG. REC. S12667 (daily ed. November 10, 2005)(introduced by Sen. Graham, passed by roll call vote, 49 - 42), as amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. November 14, 2005).

¹³⁰ The amendment refers to both the Combatant Status Review Tribunals (“CSRTs”), the initial administrative procedure to confirm the detainees’ status as enemy combatants, and the Administrative Review Boards, which were established to provide annual review that the detainees’ continued detention is warranted.

¹³¹ *Boumediene*, 128 S.Ct. at 2275 (2008).

¹³² *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).

¹³³ Congress in 2006 amended one version of the DTA to provide that jurisdiction would cease in the event the detainee was transferred from U.S. custody. Compare P.L. 109-163, title XIV, § 1405(e)(2) and P.L. 109-148, div. A, title X, § 1005(e)(2), as amended by P.L. 109-366 § 10, 10 U.S.C. § 801 note.

¹³⁴ P.L. 109-163, title XIV, § 1405(e)(3) and P.L. 109-148, div. A, title X, § 1005(e)(3), both codified at 10 U.S.C. § 801 note.

¹³⁵ The first version of the DTA, P.L. 109-148, was amended by the 2006 MCA, P.L. 109-366 § 9 to change the (continued...)

correct standards consistent with Military Commission Order No. 1 (implementing President Bush's Military Order) and whether those standards were consistent with the Constitution and laws of the United States, to the extent applicable.

The Military Commissions Act of 2006

After the Court's decision in *Hamdan*, the Bush Administration proposed legislation to Congress,¹³⁶ a version of which was enacted on October 17, 2006. The Military Commissions Act of 2006 (MCA or 2006 MCA) authorized the trial of certain detainees by military commission and prescribed detailed rules to govern their procedures.¹³⁷ The 2006 MCA also amended the DTA provisions regarding appellate review and *habeas corpus* jurisdiction. In 2009, Congress enacted the Military Commissions Act of 2009 (2009 MCA) as part of the National Defense Authorization Act for FY2010 (P.L. 111-84). The 2009 MCA modified many of the rules for military commissions to make them more closely resemble those used in courts-martial proceedings,¹³⁸ but made only minor modifications to existing laws concerning court jurisdiction to adjudicate claims raised by detainees.

Provisions Affecting Court Jurisdiction

The 2006 MCA expanded the DTA to make its review provisions the exclusive remedy for all aliens detained as enemy combatants anywhere in the world, rather than only those housed at Guantanamo Bay, Cuba.¹³⁹ It does not, however, require that all detainees undergo a CSRT or a military tribunal in order to continue to be confined. However, inasmuch as the U.S. Court of Appeals for the District of Columbia Circuit declared the DTA appellate procedures to be defunct in light of the Supreme Court's *Boumediene* decision, it appears that all challenges must now be

(...continued)

reference from military commissions pursuant to President Bush's military order to refer to the military commissions established pursuant to the MCA and to make review "as of right" for all verdicts, irrespective of the sentence, but the version of the DTA passed in P.L. 109-163 was not amended. The amended version of the DTA was amended again by the 2009 MCA to strike paragraph 3 altogether, P.L. 111-84, title XVIII § 1803(b), 123 stat. 2574, 2612. Appeals of military commission at the D.C. Circuit are now covered by 10 U.S.C. § 950g, although the first version of the DTA, (P.L. 109-148) was neither amended nor repealed.

¹³⁶ Senator Frist introduced the Bush Administration's proposal as the "Bringing Terrorists to Justice Act of 2006," S. 3861. The Senate Armed Services Committee reported favorably a bill called the "Military Commissions Act of 2006" (S. 3901), which was in many respects similar to the Administration's proposal, but varied with respect to jurisdiction and some rules of evidence. The House Armed Services Committee approved H.R. 6054, also called the "Military Commissions Act of 2006," which closely tracked the Bush Administration's proposal. After reaching an agreement with the White House with respect to several provisions in S. 3901, Senator McCain introduced S. 3930, again entitled the "Military Commissions Act of 2006." Representative Hunter subsequently introduced a modified version of H.R. 6054 as H.R. 6166, which the House of Representatives passed on September 28, 2006. A manager's amendment to S. 3930, substantially identical to the bill passed by the House, was passed by the Senate the following day.

¹³⁷ P.L. 109-366. For a further description of the procedures associated with these military commissions, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea; and CRS Report R40752, *The Military Commissions Act of 2006 (MCA): Background and Proposed Amendments*, by Jennifer K. Elsea.

¹³⁸ For discussion, see CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea.

¹³⁹ P.L. 109-148 § 1005, as amended by P.L. 109-366 § 10. Section 1405 of P.L. 109-163 was not amended.

brought by means of *habeas* review rather than under the DTA. The records of CSRT proceedings will likely be relevant to *habeas* determinations.

Appeals from the final decisions of military commissions continue to go to the United States Court of Appeals for the District of Columbia Circuit as they did under the DTA,¹⁴⁰ but are routed through an appellate body, the Court of Military Commission Review (CMCR). Review of decisions of a military commission may only concern matters of law, not fact.¹⁴¹ Under the 2006 MCA, appeals could be based on inconsistencies with the procedures set forth by the act, or, to the extent applicable, the Constitution or laws of the United States. The 2009 MCA specifies that the circuit court may consider and take action regarding the sufficiency of the evidence used to support the commission's verdict.

Section 7 of the 2006 MCA revoked U.S. courts' jurisdiction to hear *habeas corpus* petitions by all aliens in U.S. custody as enemy combatants, including lawful enemy combatants, regardless of the place of custody. It replaced 28 U.S.C. § 2241(e), the *habeas* provision added by the DTA, with language providing that

- (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
- (2) Except as provided in paragraphs (2) [review of CSRT determinations] and (3) [review of final decisions of military commissions] of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.¹⁴²

This amendment took effect on the date of its enactment, and applied to “all cases, without exception, pending on or after the date of [enactment] which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.” In *Boumediene v. Bush*, discussed *infra*, the Supreme Court held that MCA § 7 acted as an unconstitutional suspension of the writ of *habeas corpus*, and authorized Guantanamo detainees to petition federal district courts for *habeas* review of CSRT determinations of their enemy combatant status.

Under the DTA appeals provision, there was no apparent limit to the amount of time a detainee could spend awaiting a determination as to combatant status. Aliens who continue to be detained despite having been determined not to be enemy combatants were not permitted to challenge their continued detention or their treatment, nor were they able to protest their transfer to another country, for example, on the basis that they fear torture or persecution. However, these matters may be raised in *habeas* petition. The extent of relief the courts may be able to grant under *habeas* review is currently being litigated.

¹⁴⁰ 2006 MCA § 5.

¹⁴¹ 10 U.S.C. § 950g(d) (as amended).

¹⁴² 2006 MCA § 7. See also, CRS Report R40752, *The Military Commissions Act of 2006 (MCA): Background and Proposed Amendments*, by Jennifer K. Elsea.

Provisions Regarding the Geneva Conventions

A continuing source of dispute in the detention and treatment of detainees is the application of the Geneva Convention. As noted previously, the *habeas corpus* statute has traditionally provided for, among other things, challenges to allegedly unlawful detentions based on rights found in treaties.¹⁴³ Thus, for instance, Common Article 3 of the 1949 Geneva Conventions, which prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” has been used as a basis for challenging the confinement of detainees.¹⁴⁴

Section 5 of the 2006 MCA (28 U.S.C. § 2241 note), however, specifically precludes the application of the Geneva Conventions to *habeas* or other civil proceedings.¹⁴⁵ Further, the MCA, as amended, provides that the Geneva Conventions may not be claimed as a basis for a private right of action by an alien who is subject to military commission proceedings.¹⁴⁶ However, Congress in the 2009 MCA removed language deeming that the military commission structure established by the act complies with the requirement under Common Article 3 of the Geneva Convention that trials be by a regularly constituted court.¹⁴⁷

In addition, the act provides that the President shall have the authority to interpret the meaning of the Geneva Conventions.¹⁴⁸ The intended effect of this provision is unclear. While the President generally has a role in the negotiation, implementation, and domestic enforcement of treaty obligations,¹⁴⁹ this power does not generally extend to “interpreting” treaty obligations, a role more traditionally associated with courts.¹⁵⁰ In general, Congress is prohibited from exercising powers allocated to another branch of government.¹⁵¹ In *United States v. Klein*,¹⁵² the Supreme

¹⁴³ 28 U.S.C. § 2241.

¹⁴⁴ GPW art. 3 § 1(d). See *Hamdan*, 548 U.S. at 630-632 (noting the application of this provision of the Geneva Conventions to detainees through the UCMJ Article 21).

¹⁴⁵ 2006 MCA § 5(a) (28 U.S.C. § 2241 note) provides that “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”

¹⁴⁶ 10 U.S.C. § 948b(e) provides that “No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.” Previously, under the 2006 MCA, the Geneva Conventions were not available “as a source of rights” in military commissions. Prior 10 U.S.C. § 948b(g).

¹⁴⁷ Prior 10 U.S.C. § 948b(f), provided that a military commission is a “regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”

¹⁴⁸ 2006 MCA § 6(a)(3)(A) (18 U.S.C. § 2441 note) provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”

¹⁴⁹ See, e.g., *id.* (President is given power to promulgate higher standards and administrative regulations for violations of treaty obligations).

¹⁵⁰ See, e.g., 2006 MCA § 6(a)(3)(B)(18 U.S.C. § 2441 note) (“No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.”).

¹⁵¹ See *Dickerson v. United States*, 530 U.S. 428, 438 (2000) (striking down congressional statute purporting to overturn the Court’s Fourth Amendment ruling in *Miranda v. Arizona*); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Congress’ enforcement power under the Fourteenth Amendment does not extend to the power to alter the (continued...))

Court invalidated a law passed by Congress that was designed to frustrate an earlier finding of the Supreme Court as to the effect of a presidential pardon.¹⁵³ Similarly, a law that was specifically intended to grant the authority of the President to adjudicate or remedy treaty violations could violate the doctrine of separation of powers, as providing relief from acts in violation of treaties is a judicial branch function.¹⁵⁴ Instead, what appears to be the main thrust of this language is to establish the authority of the President within the Executive Branch to issue interpretative regulations by Executive Order.¹⁵⁵ However, the context in which this additional authority would be needed is unclear.

One possible intent of this provision is that the President is being given the authority to “interpret” the Geneva Convention for diplomatic purposes (e.g., to define treaty obligations and encourage other countries to conform to such definitions). This interpretation seems unlikely, as the President’s power in this regard is already firmly established.¹⁵⁶ Another possible meaning is that the President is being given the authority to apply the Geneva Conventions to particular fact situations, such as specifying what type of interrogation techniques may be lawfully applied to a particular individual suspected of being an enemy combatant. This interpretation is possible, but it is not clear how the power to “interpret” would be significant in that situation, as the 2006 MCA precludes application of the Geneva Convention in those contexts in which such interrogations would be challenged—military commissions, *habeas corpus*, or any other civil proceeding.¹⁵⁷

The more likely intent of this language would be to give the President the authority to promulgate regulations prescribing standards of behavior of employees and agents of federal agencies. For instance, this language might be seen as authorizing the President to issue regulations to implement how agency personnel should comply with the Geneva Conventions, policies which

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Constitution); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 225 (Congress may not disturb final court rulings).

¹⁵² 80 U.S. (13 Wall.) 128 (1871).

¹⁵³ The Court struck down the law, essentially holding that the Congress had an illegitimate purpose in passage of the law. “[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.... It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.” 80 U.S. at 146. The Court also found that the statute impaired the effect of presidential pardon, and thus “infringe[ed] the constitutional power of the Executive.” *Id.* at 147.

¹⁵⁴ See generally *Miller v. French*, 530 U.S. 327, 350-51 (2000) (Souter, J., concurring).

¹⁵⁵ 2006 MCA § 6(a)(3)(B), codified at 18 U.S.C. § 2441 note..

¹⁵⁶ “If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.” *Whitney v. Robertson* 124 U.S. 190, 194 (1888).

¹⁵⁷ 2006 MCA § 5(a), codified at 28 U.S.C. § 2241 note. See also *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411, at *6 (D.C. Cir. Jan. 5, 2010) (2006 MCA precluded petitioner from raising claim that government’s failure to accord him prisoner of war status violated Geneva Convention requirements). Because *habeas* petitions and other claims by persons properly deemed to be enemy combatants were precluded by the DTA and the MCA, it appears that section 5 of the 2006 MCA was intended to prohibit other detainees, including U.S. citizens and prisoners of war, from asserting rights under the Geneva Conventions in a petition for *habeas corpus* or other civil proceeding, but only against the United States. Section 1405(e) of P.L. 109-63; 2006 MCA, §7(a). See also *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009) (MCA precluded petitioner, a designated prisoner of war under the Geneva Conventions, from invoking Conventions in challenge to his proposed extradition to France), cert. denied 2010 WL 249001 (U.S. Jan 25, 2010) (No. 09-35).

might otherwise be addressed at the agency level. Thus, for instance, if the CIA had established internal procedures regarding how to perform interrogation consistent with the Geneva Convention, then this language would explicitly authorize the President to amend such procedures by Executive Order.¹⁵⁸ Whether the President already had such power absent this language is beyond the scope of this report.

Post-2006 MCA Issues and Developments

Shortly after the enactment of the 2006 MCA, the government filed motions to dismiss all of the *habeas* petitions in the D.C. Circuit involving detainees at Guantanamo Bay¹⁵⁹ and the petition of an alien then detained as an enemy combatant in a naval brig in South Carolina.¹⁶⁰

Possible Application to U.S. Citizens

As originally enacted, the 2006 MCA provided that military commissions could exercise personal jurisdiction over alien “unlawful enemy combatants.” Pursuant to modifications made by the 2009 MCA, military commissions may now exercise jurisdiction over alien “unprivileged enemy belligerents.”¹⁶¹ Despite the difference in nomenclature, the two terms are used to refer to similar categories of persons.

Some observers raised concern that the 2006 MCA permits the President to detain American citizens as enemy belligerents without trial.¹⁶² The prohibition in the 2006 MCA with respect to *habeas corpus* petitions applied only to those filed by or on behalf of aliens detained by the United States as enemy combatants. However, both MCAs can be read by implication to permit the detention of U.S. citizens as enemy belligerents, although it does not permit their trial by military commission, which could affect their entitlement to relief using *habeas corpus* procedures.¹⁶³

A plurality of the Supreme Court held in 2004 in *Hamdi v. Rumsfeld*,¹⁶⁴ that the President has the authority to detain U.S. citizens as enemy combatants pursuant to the AUMF,¹⁶⁵ but that the

¹⁵⁸ Executive Order 13340, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 72 Fed. Reg. 40707 (July 20, 2007), revoked by Executive Order 13341, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4893 (January 22, 2009).

¹⁵⁹ See Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, October 20, 2006, at A18 (reporting notice submitted by Justice Department to courts of intention to move for dismissal of pending enemy combatant cases).

¹⁶⁰ *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), vacated *sub nom. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (*per curiam*).

¹⁶¹ 10 U.S.C. § 948c.

¹⁶² See, e.g., Scott Shane and Adam Liptak, *Detainee Bill Shifts Power to President*, N.Y. TIMES, September 30, 2006, at A1.

¹⁶³ The MCAs’ provisions concerning persons subject to trial before military commissions were recognized in a recent D.C. Circuit opinion as providing guidance as to the category of persons subject to military detention in the conflict with Al Qaeda and the Taliban. In *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411 (D.C. Cir. Jan. 5, 2010), the majority found that “the government’s detention authority logically covers a category of persons no narrower than is covered by its military commission authority [under the MCA]...[At a minimum,] any person subject to a military commission trial is also subject to detention.... *Id.* at *3-4.

¹⁶⁴ 542 U.S. 507 (2004).

determination of combatant status is subject to constitutional due process considerations. The *Hamdi* plurality was limited to an understanding that the phrase “enemy combatant” means an “individual who ... was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there,”¹⁶⁶ but left it to lower courts to flesh out a more precise definition. The U.S. Court of Appeals for the Fourth Circuit found that the definition continued to apply to a U.S. citizen who returned to the United States from Afghanistan and was arrested at the airport.¹⁶⁷ More recently, the Fourth Circuit appeared to have expanded the definition of “enemy combatant” to individuals arrested in the United States on suspicion of planning to participate in terrorist acts without necessarily having engaged in hostilities in Afghanistan, but this ruling was part of a judgment that was thereafter vacated by the Supreme Court. (See discussion of *Al-Marri, supra*.)

In theory, the executive branch could detain a citizen as an enemy belligerent and argue that the definition of “unprivileged enemy belligerent” provided in the 2009 MCA, which does not explicitly limit its definitional scope to aliens, bolsters the detention authority already possessed by virtue of the AUMF. Constitutional due process would apply, and the citizen could petition for *habeas corpus* to challenge his detention. However, under the 2006 MCA the citizen-combatant would not be able to assert rights based on the Geneva Convention in support of his contention that he is not an enemy belligerent. In that sense, U.S. citizens could be affected by the 2006 and 2009 MCAs even though they do not directly apply to U.S. citizens.

On the other hand, since the 2009 MCA’s definition for unprivileged enemy belligerent applies on its face only for the purposes of chapter 47a of Title 10, U.S. Code (providing for the trial by military commission of alien unprivileged enemy belligerents), it may be argued that outside of that context, the terms “enemy belligerent” and “enemy combatant” should be understood in the ordinary sense, that is, to include only persons who participate directly in hostilities against the United States. This interpretation seems unlikely, given that it would also mean that this narrower definition of “enemy belligerent” was also meant to apply in the context of the 2006 MCA’s *habeas corpus* provisions, such that some aliens who fall under the jurisdiction of a military commission under the 2006 MCA would nevertheless have been able to argue that their right to petition for *habeas corpus* or pursue any other cause of action in U.S. court is unaffected, a reading that does not seem consistent with Congress’s probable intent. Further, it does not appear that Congress meant to apply a different definition of “enemy belligerent” to persons depending on their citizenship. Congress could specify that U.S. citizens captured in the context of the armed conflict against terrorist organizations be subject to trial in U.S. court for treason or a violation of any other statute, or prescribe procedures for determining whether U.S. citizens are subject to detention as enemy belligerents, if constitutional, but it has not done so.

DTA Challenges to Detention

At the same time as it was considering the *Boumediene* case, the D.C. Circuit was reviewing several challenges brought pursuant to the DTA in which detainees contested CSRT determinations that they are properly detained as “enemy combatants.” The first of these cases to

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¹⁶⁵ P.L. 107-40, 115 Stat. 224 (2001).

¹⁶⁶ 542 U.S. at 516.

¹⁶⁷ Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

advance involved Haji Bismullah, who was captured in Afghanistan in 2003, and Husaifa Parhat and six other detainees, all ethnic Chinese Uighers captured in Pakistan in December 2001. In January 2009, the D.C. Circuit ruled that the judicial review system established under by the DTA had been effectively nullified by the Supreme Court's ruling in *Boumediene*, meaning that detainees could only challenge the legality of their confinement via *habeas corpus* review.

Bismullah v. Gates

At issue was a series of motions filed by both parties seeking to establish procedures governing access to classified information, attorneys' access to clients, and other matters. The petitioners sought to have the court adopt rules similar to what the district court had ordered when the cases were before it on petitions of *habeas corpus*. The government sought to establish rules restricting scope of discovery and attorney-client communication to what it viewed as the proper scope of the court's review, that is, the CSRT proceedings.

The D.C. Circuit in July 2007 issued an order rejecting the government's motion to limit the scope of the court's review to the official record of the CSRT hearings (*Bismullah I*).¹⁶⁸ Rather, the court decided, in order to determine whether a preponderance of evidence supported the CSRT determinations, it must have access to *all* the information a CSRT "is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense." The court denied the petitioners' motion for discovery, at least for the time being, stating there was no need for additional evidence to challenge a CSRT's ruling that specific evidence or a witness was not reasonably available. And, because the DTA does not authorize the court to hold a status determination invalid as "arbitrary and capricious," there was no need for it to evaluate the conduct of other detainees' CSRTs. The court also denied as unnecessary the petitioners' motion to appoint a special master.

The court also promised to enter a protective order to implement guidelines for handling classified and sensitive information and for government monitoring of attorney client written communications ("legal mail"). Again stressing its mandate under the DTA to determine whether a preponderance of the evidence supports a CSRT's status determination, the court found that counsel for the detainees, to aid in their capacity to assist the court, should be presumed to have a "need to know" all government information concerning their clients except for highly sensitive information, in which case the government could present the evidence to the court *ex parte*. The court rejected the government's proposal that would have allowed the government, rather than the court, to determine what unclassified information would be required to be kept under seal. With respect to legal mail, the court agreed to the government's proposal to have mail from attorneys to detainees reviewed by a "privilege team," composed of Department of Defense personnel not involved in the litigation, to redact information not pertinent to matters within the court's limited scope of review.

The government asked the panel to reconsider the ruling based on its belief that the order would require the government to undertake an overly burdensome search of all relevant federal agencies in order to create a new record for each detainee that would be entirely different from the record reviewed by the CSRT for that case. The court denied the request for rehearing, explaining its view that its previous order would not require a search for information that is not "reasonably

¹⁶⁸ Bismullah v. Gates, 501 F.3d 178 (*Bismullah I*), *reh'g denied* 503 F.3d 137(D.C. Cir. 2007) (*Bismullah II*).

available” (*Bismullah II*).¹⁶⁹ The court also suggested that the government might instead convene new CSRTs to reconfirm the detainees’ status, this time ensuring that the relevant documents are retained for the purpose of review under the DTA. The government also objected to the requirement that it turn over classified information to the petitioners’ counsel on the basis of the risk to intelligence sources and methods as well as the burden of conducting the necessary reviews to determine which information must be turned over. The court rejected the argument, pointing out that DOD regulations declare classified information to be not reasonably available where the originating agency declines to authorize its use in the CSRT process. In light of this fact, the court suggested, the burden of reviewing the information should not be as great as the government had argued.

The government then asked for an *en banc* hearing, but the D.C. Circuit, evenly divided, declined.¹⁷⁰ The government then sought expedited review at the Supreme Court, urging the Court to decide the cases concurrently with the *Boumediene* case, but the Court took no action on the request.¹⁷¹ Instead, it granted certiorari and vacated the decision, remanding for reconsideration in light of its decision in *Boumediene*.¹⁷² On August 22, 2008, the D.C. Circuit reinstated without explanation its decisions in *Bismullah I* and *Bismullah II*, presumably because it did not find the *Boumediene* ruling to conflict with its decisions in these cases.¹⁷³

The government subsequently petitioned for a rehearing of the case, arguing that the Supreme Court’s ruling in *Boumediene* effectively nullified the system of circuit court review established by the DTA, as Congress had not intended for detainees to have two judicial forums in which to challenge their detention.¹⁷⁴ The D.C. Circuit granted the government’s motion for rehearing, and on January 9, 2009, a three-judge panel held that, in light of the Supreme Court’s ruling in *Boumediene* restoring detainees’ ability to seek *habeas* review of the legality of their detention, the appellate court no longer had jurisdiction over petitions for review filed pursuant to the DTA. Writing for the panel, Judge Douglas H. Ginsburg described both the text of the DTA and the subsequent jurisdiction-stripping measures of the 2006 MCA, stating they left no doubt that

¹⁶⁹ *Bismullah II*, 503 F. 3d 137 (D.C. Cir. 2007).

¹⁷⁰ *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008).

¹⁷¹ *Gates v. Bismullah* (U.S., filed February 14, 2008) (07-1054).

¹⁷² *Gates v. Bismullah*, 128 S.Ct. 2960 (2008). The D.C. Circuit’s determination of how to carry out its mandate under the DTA was a matter of interest to the Supreme Court as it was considering *Boumediene*, and may have had some bearing on the ultimate determination that the DTA procedures are not an adequate substitute for the writ of *habeas corpus*. Accordingly, it may be worthwhile to review some of the shortcomings described by the dissent, the only opinion of the panel that addressed the adequacy of the DTA procedures as a substitute for *habeas corpus*. Judge Janice Rogers Brown, concurring separately in *Bismullah I*, set forth a number of issues she felt call into question the fairness of the CSRT proceedings. For example, she noted that the detainee bears the burden of proving that he is not an “enemy combatant”—a term she described as elastic in nature, even though the detainee may not be aware of the information he is expected to rebut, all without the assistance of counsel. *See Bismullah I*, 501 F.3d at 193 (Rogers, J. Concurring). Further, the record presented to the CSRT is limited by the Executive, and the detainee’s only recourse for seeking further evidence is through the DTA review process. If the detainee is successful in obtaining new evidence, his remedy appears to be a new CSRT. *Id.* Finally, she noted evidence that the CSRTs do not necessarily follow their own regulations regarding the collection and presentation of evidence. *Id.* (citing differences between written procedures and those described by Rear Admiral James M. McGarrah in the *Boumediene* case).

¹⁷³ *Bismullah v. Gates*, Case No. 06-1197, Order (D.C. Cir. August 22, 2008) (*per curium*), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/bismullah-order-8-22-08.pdf>.

¹⁷⁴ *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009). In a previous case, the government had argued for abeyance of a detainee’s petition for review of his detention under DTA procedures pending conclusion of *habeas* proceedings. The D.C. Circuit granted the government’s motion for abeyance, and raised the possibility in *dicta* that the *Boumediene* had foreclosed direct Circuit Court review under the DTA. *Basardh v. Gates*, 545 F.3d 1068 (D.C. Cir. 2008).

Congress understood review under DTA to be a substitute for and not a supplement to *habeas corpus* and hence the exclusive means by which a detainee could contest the legality of his detention in a court.¹⁷⁵ In the aftermath of *Boumediene*, Judge Ginsburg wrote, the DTA “can no longer function in a manner consistent with the intent of Congress.”¹⁷⁶ Accordingly, the court held that the DTA may no longer serve as an avenue of judicial review of detainees’ claims, as Congress had intended this review process to be available to detainees only in the absence of the availability of *habeas* review. In January 2009, a review panel considering new information determined that Bismullah was not an enemy combatant, and he was repatriated to Afghanistan.¹⁷⁷

Parhat v. Gates

In October 2007, while the government’s petition to the Supreme Court for certiorari in the *Bismullah* case was pending, the government produced to the counsel of Husaifa Parhat, one of the parties to the *Bismullah* case, a record (including both classified and unclassified material) of what was actually presented to Parhat’s CSRT. Parhat subsequently filed a separate motion to the D.C. Circuit requesting review of the CSRT’s determination that he was an enemy combatant. In June 2008, a three-judge panel for the D.C. Circuit ruled in the case of *Parhat v. Gates* that petitioner had been improperly deemed an “enemy combatant” by a CSRT, the first ruling of its kind by a federal court. Because the court’s opinion contained classified information, only a redacted version has been released.¹⁷⁸

Parhat, an ethnic Chinese Uighur captured in Pakistan in December 2001, was found to be an “enemy combatant” by the CSRT on account of his affiliation with a Uighur independence group known as the East Turkistan Islamic Movement (ETIM), which was purportedly “associated” with Al Qaeda and the Taliban and engaged in hostilities against the United States and its coalition partners. The basis for Parhat’s alleged “affiliation” with the ETIM was that an ETIM leader ran a camp in Afghanistan where Parhat had lived and received military training. For his part, Parhat denied membership in the ETIM or engagement in hostilities against the United States, and claimed he traveled to Afghanistan solely to join the resistance against China, which was not alleged to have been a coalition partner of the United States.

The Circuit Court agreed with Parhat that the record before the CSRT did not support the finding that he was an “enemy combatant,” as that term had been defined by the DOD, and accordingly the CSRT’s determination was not supported by a “preponderance of the evidence” and “consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals,” as required by the DTA.¹⁷⁹ The DOD defined an “enemy combatant” as

an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes

¹⁷⁵ *Bismullah*, 551 F.3d at 1075.

¹⁷⁶ *Id.*

¹⁷⁷ William Glaberson, *Rulings of Improper Detentions as the Bush Era Closes*, NY TIMES, Jan. 18, 2009.

¹⁷⁸ *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

¹⁷⁹ Although Parhat argued that the DOD’s regulatory definition of “enemy combatant” exceeded the scope authorized by the 2001 AUMF, the Circuit Court declined to reach this issue, finding that the government provided insufficient evidence to demonstrate that Parhat met the DOD’s own regulatory definition.

any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.¹⁸⁰

Both parties agreed that for a detainee who is not a member of the Taliban or Al Qaeda to be deemed an enemy combatant under this definition, the government must demonstrate by a preponderance of the evidence that (1) the detainee was part of or supporting “forces”; (2) those forces are associated with Al Qaeda or the Taliban; and (3) the forces are engaged in hostilities against the United States or its coalition partners.¹⁸¹

The circuit court found that the evidence presented by the government to support the second and third elements was insufficient to support the CSRT’s determination that Parhat was an enemy combatant. Most significantly, the court found that the principal evidence presented by the government regarding these elements—four government intelligence documents describing ETIM activities and the group’s relationship with Al Qaeda and the Taliban—did not “provide any of the underlying reporting upon which the documents’ bottom-line assertions are founded, nor any assessment of the reliability of that reporting.”¹⁸² As a result, the circuit court found that neither the CSRT nor the reviewing court itself were capable of assessing the reliability of the assertions made by the documents. Accordingly “those bare assertions cannot sustain the determination that Parhat is an enemy combatant,”¹⁸³ and the CSRT’s designation was therefore improper. The circuit court stressed that it was not suggesting that hearsay evidence could never reliably be used to determine whether a person was an enemy combatant, or that the government must always submit the basis for its factual assertions to enable an assessment of its claims. However, evidence “must be presented in a form, or with sufficient additional information, that permits the [CSRT] and court to assess its reliability.”¹⁸⁴

Having found that the evidence considered by the CSRT was insufficient to support the designation of Parhat as an enemy combatant, the circuit court next turned to the question of remedy. Although Parhat urged the court to order his release or transfer to a country other than China, the court declined to grant such relief, postulating that the government might wish to hold another CSRT in which it could present additional evidence to support Parhat’s designation as an enemy combatant. While acknowledging that the DTA did not expressly grant the court release authority over detainees, the court stated that there was nonetheless “a strong argument ... [that release authority] is implicit in our authority to determine whether the government has sustained its burden of proving that a detainee is an enemy combatant,”¹⁸⁵ and indicated that it would not “countenance ‘endless do-overs’” in the CSRT process.

The circuit court also noted that following the Supreme Court’s ruling in *Boumediene*, Parhat could pursue immediate *habeas* relief in federal district court, where he would “be able to make use of the determinations we have made today regarding the decision of his CSRT, and ... raise

¹⁸⁰ *Parhat*, 532 F.3d at 838, quoting Dept. of Def. Order Establishing Combatant Status Review Tribunal (July 7, 2004), at 1.

¹⁸¹ *Id.*

¹⁸² *Id.* at 846-847.

¹⁸³ *Id.* at 847.

¹⁸⁴ *Id.* at 849.

¹⁸⁵ *Parhat*, 532 F.3d at 850 .

issues that we did not reach” before a court which unquestionably would have the power to order his release.¹⁸⁶

The continuing viability of the circuit court’s ruling in *Parhat* is unclear given the Court’s subsequent ruling in *Bismullah* that the DTA review process has been nullified. However, the circuit court panel in *Bismullah* implied that, despite its determination that the DTA review process was no longer available to detainees, the its ruling in *Parhat* remains in force.¹⁸⁷

The government declined to reconvene CSRTs for Parhat and 16 other Uighurs detained at Guantanamo, and no longer considers them enemy combatants. However, the DOD continues to maintain custody over them pending their transfer to a third country. The government was initially unable to effectuate their transfer to a country where they would not face a substantial risk of torture or persecution. Although some of the Uighurs have successfully been transferred to other countries,¹⁸⁸ several remain at Guantanamo. The Uighurs filed *habeas* petitions with the U.S. District Court for D.C., and requested that they be released into the United States pending the court’s final judgment on their *habeas* petitions. In October 2008, District Court Judge Ricardo M. Urbina found that the government had no authority to detain the petitioners and ordered their release into the United States,¹⁸⁹ at least until they may be transferred to a third country.

The government quickly filed an emergency motion with the D.C. Circuit to temporarily stay Judge Urbina’s ruling pending the circuit court’s disposition of a government motion for a stay pending appeal. The emergency motion was granted by a three-judge panel of the circuit court.¹⁹⁰ Later, the panel granted the government’s motion for expedited review of the district court’s order and, in a 2-1 decision, a stay of the Uighurs’ transfer pending review of the district court’s ruling.¹⁹¹ In February 2009, the circuit panel reversed the district court, finding that the constitutional writ of *habeas* did not entitle petitioners to the “extraordinary remedy” of being released into the United States in light of long-standing jurisprudence recognizing the “exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States.”¹⁹² The Supreme Court subsequently agreed to hear an appeal of the circuit court’s ruling, and arguments will likely be heard last this year in the case of *Kiyemba v. Obama*.¹⁹³ Since that time, four of the Uighurs have been resettled in Bermuda, and six others have been transferred to Palau.¹⁹⁴ Switzerland has agreed to admit the tow remaining Uighur detainees,¹⁹⁵ which may lead to a termination of the *Kiyemba* case on mootness grounds.

¹⁸⁶ *Id.* at 851.

¹⁸⁷ *Bismullah*, 551 F.3d at 1075, n. 2.

¹⁸⁸ See William Glaberson, *6 Detainees Are Freed as Questions Linger*, NY TIMES, June 11, 2009 (discussing transfer of four Uighur detainees to Bermuda).

¹⁸⁹ *In re Guantanamo Bay Detainee Litigation*, 581 F.Supp.2d 33 (D.D.C. 2008).

¹⁹⁰ *Kiyemba v. Bush*, No. 08-5424, Order (D.C. Cir., October 8, 2008) (*per curiam*).

¹⁹¹ *Kiyemba v. Bush*, No. 08-5424, 2008 WL 4898963, Order (D.C. Cir., October 20, 2008) (*per curiam*).

¹⁹² *Kiyemba v. Obama*, 555 F.3d 1022, 1025, 1028 (D.C. Cir. 2009).

¹⁹³ *Kiyemba v. Obama*, 130 S.Ct. 458 (October 20, 2009).

¹⁹⁴ See Andrei Scheinkman et al., “The Guantanamo Docket,” NY TIMES, at <http://projects.nytimes.com/guantanamo> [hereinafter “Guantanamo Docket”] (providing information regarding current and former Guantanamo population, including countries to which former detainees have been transferred).

¹⁹⁵ Swiss rebuke Chinese, grant asylum for Uighurs now at Guantánamo Bay, MIAMI HERALD, FEB. 3, 2010.

Boumediene v. Bush¹⁹⁶

The petitioners in *Boumediene* were aliens detained at Guantanamo who sought *habeas* review of their continued detention. Rather than pursuing an appeal of their designation as enemy combatants by CSRTs using the DTA appeals process, the petitioners sought to have the district court decisions denying *habeas* review reversed on the basis that the 2006 MCA's "court-stripping"¹⁹⁷ provision was unconstitutional.¹⁹⁸ On appeal, the D.C. Circuit affirmed, holding that the 2006 MCA stripped it and all other federal courts of jurisdiction to consider petitioners' *habeas* applications. Relying upon its earlier opinion in *Al Odah v. United States*¹⁹⁹ and the 1950 Supreme Court case *Johnson v. Eisentrager*,²⁰⁰ in which the Supreme Court found that the constitutional writ of *habeas* was not available to enemy aliens imprisoned for war crimes in post-WWII Germany, the D.C. Circuit held that the 2006 MCA's elimination of *habeas* jurisdiction did not operate as an unconstitutional suspension of the writ, because aliens held by the United States in foreign territory do not have a constitutional right to *habeas*.²⁰¹ Consequently, the court did not examine whether the DTA provides an adequate substitution for *habeas* review.

The Supreme Court initially denied the petitioners' request for review,²⁰² with three Justices dissenting to the denial and two Justices explaining the basis for their support.²⁰³ In June 2007, however, the Court reversed its denial and granted certiorari to consider the consolidated cases of *Boumediene* and *Al Odah*. In a 5-4 opinion authored by Justice Kennedy, the Court reversed the D.C. Circuit and held that petitioners had a constitutional right to *habeas* that was withdrawn by the 2006 MCA in violation of the Constitution's Suspension Clause.²⁰⁴

¹⁹⁶ For further discussion, see CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus*, by Michael John Garcia.

¹⁹⁷ The practice of divesting courts of jurisdiction over particular issues is sometimes referred to as "court-stripping."

¹⁹⁸ *In re Guantanamo Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), *consolidated, vacated and dismissed sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

¹⁹⁹ *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir 2003), *rev'd sub nom Rasul v. Bush*, 542 U.S. 466 (2004).

²⁰⁰ 339 U.S. 763 (1950).

²⁰¹ 476 F.3d 981 (D.C. Cir. 2007). Judge Randolph, joined by Judge Sentelle, found that the measure does not constitute a suspension of the Writ within the meaning of the Constitution because the majority was "aware of no case prior to 1789 going the detainees' way," and were thus convinced that "the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government." Judge Rogers, in dissent, would have given greater deference to the Supreme Court's *Rasul* opinion, in which it drew a distinction between the situation faced by the Guantanamo detainees and the post-WWII convicts, 542 U.S. 466, 475 (2004), and in which it found the naval base to be within the historical scope of the Writ. *Boumediene*, 476 F.3d at 1002 (Rogers, J., dissenting))(citing *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003)).

²⁰² *Boumediene v. Bush*, 127 S.Ct. 1478 (2007).

²⁰³ Justice Stevens, joined by Justice Kennedy, wrote a statement explaining their view that, "despite the obvious importance of the issues raised," the petitioners should first exhaust remedies available under the DTA unless the petitioners can show that the government is causing delay or some other ongoing injury that would make those remedies inadequate. *Id.* at 1478. Justice Breyer, joined by Justices Souter and Ginsburg, would have granted certiorari to provide immediate attention to the issues. The dissenters viewed it as unlikely that further treatment by the lower courts might elucidate the issues, given that the 2006 MCA limits jurisdiction to the Court of Appeals for the D.C. Circuit, which had already indicated that Guantanamo detainees have no constitutional rights. Justices Breyer and Souter would have granted expedited consideration.

²⁰⁴ U.S. CONST. Art. 1, § 9, cl. 2.

Constitutional Right to *Habeas*

The petitioners in *Boumediene* argued that they possess a constitutional right to *habeas*, and that the 2006 MCA deprived them of this right in contravention of the Suspension Clause, which prohibits the suspension of the writ of *habeas* except “when in Cases of Rebellion or Invasion the public Safety may require it.” The 2006 MCA did not expressly purport to be a formal suspension of the writ of *habeas*, and the government did not make such a claim to the Court. Instead, the government argued that aliens designated as enemy combatants and detained outside the *de jure* territory of the United States have no constitutional rights, including the constitutional privilege to *habeas*, and that therefore stripping the courts of jurisdiction to hear petitioners’ *habeas* claims did not violate the Suspension Clause.

The Court began its analysis by surveying the history and origins of the writ of *habeas corpus*, emphasizing the importance placed on the writ for the Framers, while also characterizing its prior jurisprudence as having been “careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”²⁰⁵ The Court characterized the Suspension Clause as not only a “vital instrument” for protecting individual liberty, but also a means to ensure that the judiciary branch would have, except in cases of formal suspension, “a time-tested device, the writ, to maintain the delicate balance of governance” between the branches and prevent “cyclical abuses” of the writ by the executive and legislative branches.²⁰⁶ The Court stated that the separation-of-powers doctrine and the history shaping the design of the Suspension Clause informed its interpretation of the reach and purpose of the Clause and the constitutional writ of *habeas*.

The Court found the historical record to be inconclusive for resolving whether the Framers would have understood the constitutional writ of *habeas* as extending to suspected enemy aliens held in foreign territory over which the United States exercised plenary, but not *de jure* control. Nonetheless, the Court interpreted the Suspension Clause as having full effect at Guantanamo. While the Court did not question the government’s position that Cuba maintains legal sovereignty over Guantanamo under the terms of the 1903 lease giving the U.S. plenary control over the territory, it disagreed with the government’s position that “at least when applied to non-citizens, the Constitution necessarily stops where *de jure* sovereignty ends.”²⁰⁷

Instead, the Court characterized its prior jurisprudence as recognizing that the Constitution’s extraterritorial application turns on “objective factors and practical concerns.”²⁰⁸ Here, the Court emphasized the functional approach taken in the *Insular Cases*, where it had assessed the availability of constitutional rights in incorporated and unincorporated territories under the control of United States.²⁰⁹ Although the government argued that the Court’s subsequent decision in *Eisentrager* stood for the proposition that the constitutional writ of *habeas* does not extend to enemy aliens captured and detained abroad, the Court found this reading to be overly constrained. According to the Court, interpreting the *Eisentrager* ruling in this formalistic manner would be

²⁰⁵ *Boumediene*, 128 S.Ct. 2229 at 2248 (citing INS v. St. Cyr, 533 U. S. 289, 300-301(2001)).

²⁰⁶ *Id.* at 2247.

²⁰⁷ *Id.* at 2253.

²⁰⁸ *Id.* at 2258.

²⁰⁹ See *De Lima v. Bidwell*, 182 U. S. 1 (1901); *Dooley v. United States*, 182 U. S. 222 (1901); *Armstrong v. United States*, 182 U. S. 243 (1901); *Downes v. Bidwell*, 182 U. S. 244; *Hawaii v. Mankichi*, 190 U. S. 197 (1903); *Dorr v. United States*, 195 U. S. 138 (1904).

inconsistent with the functional approach taken by the Court in other cases concerning the Constitution’s extraterritorial application,²¹⁰ and would disregard the practical considerations that informed the *Eisentrager* Court’s decision that the petitioners were precluded from seeking *habeas*.

Based on the language found in the *Eisentrager* decision and other cases concerning the extraterritorial application of the Constitution, the Court deemed at least three factors to be relevant in assessing the extraterritorial scope of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the status determination process; (2) the nature of the site where the person is seized and detained; and (3) practical obstacles inherent in resolving the prisoner’s entitlement to the writ.

Applying this framework, the Court characterized petitioners’ circumstances in the instant case as being significantly different from those of the detainees at issue in *Eisentrager*. Among other things, the Court noted that unlike the detainees in *Eisentrager*, the petitioners denied that they were enemy combatants, and the government’s control of the post-WWII, occupied German territory in which the *Eisentrager* detainees were held was not nearly as significant nor secure as its control over the territory where the petitioners are located. The Court also found that the procedural protections afforded to Guantanamo detainees in CSRT hearings are “far more limited [than those afforded to the *Eisentrager* detainees tried by military commission], and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”²¹¹

While acknowledging that it had never before held that noncitizens detained in another country’s territory have any rights under the U.S. Constitution, the Court concluded that the case before it “lack[ed] any precise historical parallel.”²¹² In particular, the Court noted that the Guantanamo detainees have been held for the duration of a conflict that is already one of the longest in U.S. history, in territory that, while not technically part of the United States, is subject to complete U.S. control. Based on these factors, the Court concluded that the Suspension Clause has full effect at Guantanamo.

Adequacy of *Habeas Corpus* Substitute

Having decided that petitioners possessed a constitutional privilege to *habeas corpus*, the Court next assessed whether the court-stripping measure of MCA § 7 was impermissible under the Suspension Clause. Because the MCA did not purport to be a formal suspension of the writ, the question before the Court was whether Congress had provided an adequate substitute for *habeas corpus*. The government argued that the 2006 MCA complied with the Suspension Clause because it applied the DTA’s review process to petitioners, which the government claimed was a constitutionally adequate *habeas* substitute.

²¹⁰ *Boumediene*, 128 S.Ct. 2229 at 2255-56, 2258 (discussing plurality opinion in *Reid v. Covert*, 354 U. S. 1 (1957)). In his concurring opinion in *Reid*, Justice Harlan argued that whether a constitutional provision has extraterritorial effect depends upon the “particular circumstances, the practical necessities, and the possible alternatives which Congress had before it” and, in particular, whether judicial enforcement of the provision would be “impracticable and anomalous.” *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring in result).

²¹¹ *Id.* at 2260.

²¹² *Id.* at 2262.

Though the Court declined to “offer a comprehensive summary of the requisites for an adequate substitute for *habeas corpus*,” it nonetheless deemed the *habeas* privilege, at minimum, as entitling a prisoner “to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,” and empowering a court “to order the conditional release of an individual unlawfully detained,” though release need not be the exclusive remedy or appropriate in every instance where the writ is granted.²¹³ Additionally, the necessary scope of *habeas* review may be broader, depending upon “the rigor of any earlier proceedings.”²¹⁴

The Court noted that petitioners identified a myriad of alleged deficiencies in the CSRT process which limited a detainee’s ability to present evidence rebutting the government’s claim that he is an enemy combatant. Among other things, cited deficiencies include constraints upon the detainee’s ability to find and present evidence at the CSRT stage to challenge the government’s case; the failure to provide a detainee with assistance of counsel; limiting the detainee’s access to government records other than those that are unclassified, potentially resulting in a detainee being unaware of critical allegations relied upon by the government to order his detention; and the fact that the detainee’s ability to confront witnesses may be “more theoretical than real,”²¹⁵ given the minimal limitations placed upon the admission of hearsay evidence.

While the Court did not determine whether the CSRTs, as presently constituted, satisfy due process standards, it agreed with petitioners that there was “considerable risk of error in the tribunal’s findings of fact.”²¹⁶ “[G]iven that the consequence of error may be detention for the duration of hostilities that may last a generation or more, this is a risk too serious to ignore.”²¹⁷ The Court held that for either the writ of *habeas* or an adequate substitute to function as an effective remedy for petitioners, a court conducting a collateral proceeding must have the ability to (1) correct errors in the CSRT process; (2) assess the sufficiency of the evidence against the detainee; and (3) admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding.

The Court held that the DTA review process is a facially inadequate substitute for *habeas* review. It listed a number of potential constitutional infirmities in the review process, including the absence of provisions (1) empowering the D.C. Circuit to order release from detention; (2) permitting petitioners to challenge the President’s authority to detain them indefinitely; (3) enabling the appellate court to review or correct the CSRT’s findings of fact; and (4) permitting the detainee to present exculpatory evidence discovered after the conclusion of CSRT proceedings. As a result, the Court deemed 2006 MCA § 7’s application of the DTA review process to petitioners as failing to provide an adequate substitute for *habeas*, therefore effecting an unconstitutional suspension of the writ.

In light of this conclusion, the Court held that petitioners could immediately pursue *habeas* review in federal district court, without first obtaining review of their CSRT designations from the D.C. Circuit as would otherwise be required under the DTA review process. While prior jurisprudence recognized that prisoners are generally required to exhaust alternative remedies

²¹³ *Boumediene*, 128 S. Ct. 2229 at 2266-67.

²¹⁴ *Id.* at 2268.

²¹⁵ *Id.* at 2269.

²¹⁶ *Id.* at 2270.

²¹⁷ *Id.*

before seeking federal *habeas* relief, the Court found that petitioners in the instant case were entitled to a prompt *habeas* hearing, given the length of their detention. The Court stressed, however, that except in cases of undue delay, federal courts should generally refrain from considering *habeas* petitions of detainees being held as enemy combatants until after the CSRT had an opportunity to review their status. Acknowledging that the government possesses a “legitimate interest in protecting sources and methods of intelligence gathering,” the Court announced that it expected courts reviewing Guantanamo detainees *habeas* claims to use “discretion to accommodate this interest to the greatest extent possible,” so as to avoid “widespread dissemination of classified information.”²¹⁸

Implications of *Boumediene*

As a result of the *Boumediene* decision, detainees currently held at Guantanamo may petition a federal district court for *habeas* review of status determinations made by a CSRT. However, the full consequences of the *Boumediene* decision are likely to be significantly broader. While the petitioners in *Boumediene* sought *habeas* review of their designation as enemy combatants, the Court’s ruling that the constitutional writ of *habeas* extends to Guantanamo suggests that detainees may also seek judicial review of claims concerning unlawful conditions of treatment or confinement or to protest a planned transfer to the custody of another country.²¹⁹

The conduct of trials before military commissions at Guantanamo may also be affected by *Boumediene*, as enemy combatants may now potentially raise constitutional arguments against their trial and conviction. Aliens convicted of war crimes before military commissions may also potentially seek *habeas* review of their designation as an enemy combatant by the CSRT, a designation that served as a legal requisite for their subsequent prosecution before a military commission.

Although the *Boumediene* Court held that DTA review procedures were an inadequate substitute for *habeas*, it made “no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards,” and emphasized that “both the DTA and the CSRT process remain intact.”²²⁰ Whether these procedures violate due process standards, facially or as applied in a given case, and whether a particular detainee is being unlawfully held, are issues that will be addressed by the District Court when reviewing the *habeas* claims of Guantanamo detainees.

Over 200 *habeas* petitions have been filed on behalf of Guantanamo detainees in the U.S. District Court for the District of Columbia. In the aftermath of the *Boumediene* ruling, the District Court

²¹⁸ *Id.* at 2275.

²¹⁹ See *Boumediene*, 128 S. Ct. 2229 at 2274 (“In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.”).

²²⁰ *Id.* at 2275. Whether the 2006 MCA continues to preclude judicial consideration of such claims is a subject that has not been definitely resolved. In the aftermath of *Boumediene*, district court judges have continued to give effect to MCA § 7(a)(2), which bars judicial review of claims relating to conditions of detainees’ confinement. See *Khadr v. Bush*, 587 F.Supp.2d 225, 235 (D.D.C., 2008) (“the Supreme Court appears to have left ... [the MCA’s bar on judicial review of conditions of detention] undisturbed”); *In re Guantanamo Bay Detainee Litigation*, 577 F.Supp.2d 312, 314 (D.D.C.2008) (Hogan, J.) (“Cognizant of the long-standing rule of severability, this Court, therefore, holds that MCA § 7(a)(2) remains valid and strips it of jurisdiction to hear a detainee’s claims that ‘relat[e] to any aspect of the detention, transfer, treatment, trial, or conditions of confinement ... ’”). See also *In re Guantanamo Bay Detainee Litigation*, 570 F.Supp.2d 13 (D.D.C.2008) (Urbina, J.) (holding that MCA § 7(a)(2) was not invalidated by *Boumediene*, but declining to decide whether constitutional writ of *habeas* permits challenges to conditions of confinement).

adopted a resolution for the coordination and management of Guantanamo cases. The resolution calls for all current and future Guantanamo cases to be transferred by the judge to whom they have been assigned to Senior Judge Thomas F. Hogan, who has been designated to coordinate and manage all Guantanamo cases so that they may be “addressed as expeditiously as possible as required by the Supreme Court in *Boumediene v. Bush....*”²²¹ Judge Hogan is responsible for identifying and ruling on procedural issues common to the cases. The transferring judge will retain the case for all other purposes, though Judge Hogan is to confer with those judges whose cases raise common substantive issues, and he may address those issues with the consent of the transferring judge. District Court Judges Richard J. Leon and Emmet G. Sullivan have declined to transfer their cases for coordination, and it is possible that the three judges may reach differing opinions regarding issues common to their respective cases.²²² Litigation concerning detainees’ *habeas* claims remains ongoing. Final rulings have been reached in a few cases. In some instances, detainees have been ordered released (including Lakhdar Boumediene),²²³ while in others, detention has been deemed lawful.²²⁴

Executive Order to Close Guantanamo and Halt Military Commission Proceedings

On January 22, 2009, President Barack Obama issued Executive Order 13492, requiring that the Guantanamo detention facility be closed as soon as practicable, and no later than a year from the date of the Order.²²⁵ Any persons who continue to be held at Guantanamo at the time of closure are to be either transferred to a third country for continued detention or release, or transferred to another U.S. detention facility. The Order further requires specified officials to review all Guantanamo detentions to assess whether the detainee should continue to be held by the United States, transferred or released to a third country, or be prosecuted by the United States for criminal offenses.²²⁶ Reviewing authorities are required to identify and consider the legal, logistical, and security issues that would arise in the event that some detainees are transferred to the United States. The Order also requires reviewing authorities to assess the feasibility of prosecuting detainees in an Article III court. During the review period, the Secretary of Defense

²²¹ U.S. Dist. Court for the District of Columbia, Resolution of the Executive Session, July 1, 2008, available at <http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-Resolution070108.pdf>.

²²² For further discussion of recent *habeas* cases, see Benjamin Wittes, Robert Chesney & Rabea Benhalim, *The Emerging Law of Detention: The Guantanamo Habeas Cases as Lawmaking*, Brookings Institute, January 22, 2010, available at http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx.

²²³ See, e.g., *el Gharani v. Bush*, 593 F.Supp.2d 144 (D.D.C. 2009); *Boumediene v. Bush*, 579 F.Supp.2d 191(D.D.C. 2008) (granting five detainees’ *habeas* petitions). ProPublica has published a chart listing *habeas* challenges by Guantanamo detainees that have been decided by federal judges. Chisun Lee, *An Examination of 33 Gitmo Detainee Lawsuits*, Pro Publica, updated August 7, 2009, <http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722>.

²²⁴ See, e.g., *Sliti v. Bush*, 592 F.Supp.2d 46 (D.D.C. 2008); *Boumediene*, 579 F. Supp. 2d, at 198 (denying one *habeas* petition and granting five others).

²²⁵ Executive Order 13492, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” 74 *Federal Register* 4897, January 22, 2009.

²²⁶ *Id.* at § 4. The Order specifies that the review shall be conducted by the Attorney General (who shall also coordinate the review process), the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, as well as other officers or full- or part-time employees of the U.S. government (as determined by the Attorney General, with the concurrence of the relevant department head) with intelligence, counterterrorism, military, or legal expertise.

was required to take steps to ensure that all proceedings before military commissions and the United States Court of Military Commission Review were halted.

Although the deadline for the closure of the Guantanamo detention facility has not been met, the Administration has stated that it remains committed to closing the facility as expeditiously as possible. The Administration's efforts to close the detention facility have been limited, in part, by congressional measures limiting the transfer of detainees into the United States. In the first session of the 111th Congress, several appropriations and authorizations measures were enacted which effectively barred funds from being used to transfer any detainee into the United States for release or purposes other than prosecution, and restrict funds from being used to transfer detainees into the country to face prosecution prior to the submission of certain reports to Congress.²²⁷

The full implications of these actions upon ongoing litigation involving persons currently detained at Guantanamo remain to be seen. However, the closure of the Guantanamo detention facility would raise a number of legal issues with respect to the individuals presently interned there, particularly if those detainees are transferred to the United States. The nature and scope of constitutional protections owed to detainees within the United States may be different than those available to persons held at Guantanamo or elsewhere. This may have implications for the continued detention or prosecution of persons transferred to the United States. Although the scope of constitutional protections owed to Guantanamo detainees remains a matter of legal dispute, it is clear that the procedural and substantive due process protections of the Constitution apply to all persons within the United States, regardless of their citizenship.²²⁸ Accordingly, detainees transferred to the United States might be able to more successfully pursue legal challenges against aspects of their detention that allegedly infringe upon constitutional protections owed to them.²²⁹

Redefining U.S. Detention Authority

In March 2009, the Obama Administration announced a new definitional standard for the government's authority to detain terrorist suspects, which does not use the phrase "enemy combatant" to refer to persons who may be properly detained.²³⁰ Under this new definition, the Administration claims that:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its

²²⁷ Supplemental Appropriations Act, 2009 (P.L. 111-32), Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118).

²²⁸ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent").

²²⁹ For further discussion and analysis, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

²³⁰ DOJ Press Release, *supra* footnote 15; Detention Authority Memorandum, *supra* footnote 15

coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.²³¹

This definitional standard is largely similar to that used by the Bush Administration to detain terrorist suspects as “enemy combatants.” Like the previous administration, the Obama Administration claims the power to militarily detain members of the Taliban or Al Qaeda, regardless of whether such persons were captured away from the battlefield in Afghanistan.²³² However, there are a few differences in the standard used by the Bush and Obama Administrations. Most notably, whereas the Bush Administration claimed the authority to detain persons who supported Al Qaeda, the Taliban, or associated forces, the standard announced by the Obama Administration expressly requires such support to be “substantial.” While the Obama Administration claims that activities constituting “substantial support” will be developed in application to individual cases, it has stated that it would not cover “unwitting or insignificant” support.²³³

The Obama Administration has stated that this definitional standard is based upon the authority provided by the AUMF, as informed by the laws of war. The Administration has also claimed that this standard does “not rely on the President’s authority as Commander-in-Chief independent of Congress’s specific authorization.”²³⁴ The Bush Administration had previously argued that, separate from the authority provided by the AUMF, the President has the independent authority as Commander-in-Chief to order the detention of terrorist suspects. While the Obama Administration has not expressly rejected this claim, it appears that the Administration will not rely upon the notion of inherent constitutional authority to serve as a legal basis for the detention of terrorist suspects.

The full implications of this change in language and intent remain to be seen.²³⁵ One issue that is likely to be subject to debate is the Executive’s authority under the AUMF and traditional law-of-war principles to detain members of Al Qaeda or the Taliban who did not directly participate in battlefield hostilities. The nature of activities constituting “substantial support” for the groups may also merit significant judicial attention.

The scope of the Executive’s detention authority under the AUMF and the law of war has been subject to conflicting rulings in the D.C. Circuit. In 2009, several *habeas* courts reached different conclusions regarding the scope of the President’s military detention authority. A few district court judges held that the Executive has authority to detain persons who were “part of” or

²³¹ Detention Authority Memorandum, *supra* footnote 15, at *2.

²³² Detention Authority Memorandum, *supra* footnote 15 at *7-8.

²³³ *Id.* at *2.

²³⁴ DOJ Press Release, *supra* footnote 15.

²³⁵ It should also be noted that the new definitional standard announced in the Detention Authority Memorandum, *supra* footnote 15, refers only to detainees held by the United States at Guantanamo, and not those persons detained at other facilities (e.g., the Bagram Air Base in Afghanistan). However, the Obama Administration subsequently made clear in court filings and congressional reports that the same definitional standard would also be used to justify the detention of suspected belligerents held at Bagram. See Department of Justice, Brief for Respondent-Appellants, filed September 14, 2009, *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir.) (employing same definitional framework for detention authority as used with respect to detainees held at Guantanamo) (hereinafter “DOJ Brief”); Letter from Phillip Cater, Dep. Asst. Sec. Defense for Detainee Policy, to Sen. Carl Levin, Chairman of Sen. Armed Serv. Comm., July 14, 2009 (included as attachment to DOJ Brief, *supra*) (hereinafter “Bagram Policy Guidance”). Both the DOJ Brief and Bagram Policy Guidance are available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf>.

“substantially supported” Al Qaeda, the Taliban, or associated forces, so long as those terms are understood to include only those persons who were members of the enemy organizations’ *armed forces* at the time of capture.²³⁶ Other district court judges held that the Executive has authority under the AUMF and the law of war to detain persons who were “part of” the Taliban, Al Qaeda, or associated forces, but lacks authority to detain non-members who provide “support” to such organizations (though such support may be considered when determining whether a detainee was “part of” one of these groups).²³⁷

In January 2010, a three-judge panel of the D.C. Circuit Court of Appeals considered the scope of Executive’s detention authority in the case of *Al-Bihani v. Obama*.²³⁸ In an opinion supported in full by two members of the panel,²³⁹ the appellate court endorsed the definitional standard for the Executive’s detention authority that had initially been asserted by the Bush Administration (a standard which was later somewhat circumscribed by the Obama Administration²⁴⁰); namely, that the President may detain those persons who were “part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”²⁴¹ While the panel concluded that either support for or membership in an AUMF-targeted organization may be independently sufficient to justify detention, it declined “to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard.”²⁴² It did, however, note that this standard would, for example, permit the detention of a “civilian contractor” who “purposefully and materially supported” an AUMF-targeted organization through “traditional food operations essential to a fighting force and the carrying of arms.”²⁴³ Notwithstanding the government’s reliance on the law of war to interpret the scope of the AUMF and seemingly in conflict with Supreme Court discussion of the issue, the panel rejected the idea that the international law of war has any relevance to the courts’ interpretation of the scope of the detention power conferred by the AUMF.²⁴⁴ The standard endorsed by the panel will be controlling for the D.C. Circuit unless the decision is overturned

²³⁶ Gherebi v. Obama, 609 F.Supp.2d 43 (D.D.C., 2009) (Walton, J.); Al-Adahi v. Obama, 2009 WL 2584685 (D.D.C., August 21, 2009) (Kessler, J.).

²³⁷ Hamlily v. Obama, 616 F.Supp.2d 63 (D.D.C. 2009) (Bates, J.); Mattan v. Obama, 618 F. Supp. 2d 24 (D.D.C. 2009) (Lamberth, C.J.). In assessing whether an individual was “part of” the Taliban, Al Qaeda, or associated forces, several *habeas* judges have considered whether “the individual functions or participates within or under the command structure of the organization—i.e. whether he receives and executes orders or directions.” *Hamlily*, 616 F.Supp.2d at 75; Al Odah v. United States, 648 F. Supp. 2d 1, 6 (D.D.C., August 24, 2009) (Kollar-Kotelly, J.) (citing *Hamlily*); Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C., August 12, 2009) (Robertson, J.) (same).

²³⁸ *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411 (D.C. Cir. Jan. 5, 2010).

²³⁹ A third member of the panel issued a separate opinion concurring with the majority’s judgment. However, the opinion did not clearly endorse the majority’s view as to scope of the Executive’s detention authority. See id., 2010 WL 10411 at *14-15 (Williams, J., concurring) (arguing that petitioner was detainable on account of being “part of” an AUMF-targeted organization, but not deciding whether a person could be detained on account of “support” for a targeted organization that he was not also a “part of”).

²⁴⁰ See *supra* footnote 15. In contrast, the Obama Administration espouses a standard that specifies that such support must be “substantial.”

²⁴¹ *Al-Bihani*, No. 09-5051, 2010 WL 10411 at *2.

²⁴² *Id.* at *4.

²⁴³ *Id.* at *4-5. The panel found that even if petitioner was not a member of an AUMF-targeted organization, his service as a cook for a military brigade affiliated with Taliban and Al Qaeda forces, in addition to his accompaniment of the brigade during military operations, constituted sufficient grounds for his detention. *Id.*

²⁴⁴ *Id.* at *3; *id.* at *16 (Williams, J., concurring in part and concurring in the judgment) (contrasting majority position with the Supreme Court plurality opinion in *Hamdi*, 542 U.S. at 521 statement that the Court’s understanding of the AUMF “is based on longstanding law-of-war principles”).

either by the Circuit Court of Appeals sitting *en banc* or the Supreme Court, or unless Congress takes up Judge Brown's separate invitation to craft appropriate *habeas* standards for detainee cases.²⁴⁵

Constitutional Considerations and Options for Congress

The Supreme Court decision in *Boumediene* holding that the DTA violates the Constitution's Suspension Clause (article I, § 9, cl. 2) leaves open a number of constitutional questions regarding the scope of the Writ of Habeas Corpus and options open to Congress to make rules for the detention of suspected terrorists. The following sections provide a brief background of *habeas corpus* in the United States, outline some proposals for responding to the *Boumediene* holding, and discuss relevant constitutional considerations.

The Writ of Habeas Corpus (*ad subjiciendum*), also known as the Great Writ, has its origin in Fourteenth Century England.²⁴⁶ It provides the means for those detained by the government to ask a court to order their warden to explain the legal authority for their detention. In the early days of the Republic, its primary use was to challenge executive detention without trial or bail, or pursuant to a ruling by a court without jurisdiction, but the writ has expanded over the years to include a variety of collateral challenges to convictions or sentences based on alleged violations of fundamental constitutional rights.²⁴⁷ The *habeas* statute provides jurisdiction to hear petitions by persons claiming that they are held "in custody in violation of the Constitution or laws or treaties of the United States."²⁴⁸ A court reviewing a petition for *habeas corpus* does not determine the guilt or innocence of the petitioner; rather, it tests the legality of the detention and the custodian's authority to detain. If the detention is not supported by law, the detainee is to be released.²⁴⁹ Minor irregularities in trial procedures that do not amount to violations of fundamental constitutional rights are generally to be addressed on direct appeal.²⁵⁰

Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Given the emphasis the *Rasul* Court had placed on the distinction between the statutory and constitutional entitlement to *habeas corpus*, it might have seemed reasonable to suppose that Congress retained the power to revoke by statute what it had earlier granted without offending either the Court or the Constitution, without regard to establishing a public safety justification. However, as the *Boumediene* case demonstrates, the special status accorded the Writ by the Suspension Clause complicates matters.

²⁴⁵ *Id.* at *16 (Brown, J. concurring).

²⁴⁶ For a general background and description of related writs, see 39 AM. JUR. 2d. *Habeas Corpus* § 1 (1999).

²⁴⁷ See generally S. Doc. No. 108-17 at 848 *et seq.*

²⁴⁸ *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁴⁹ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

²⁵⁰ 39 AM. JUR. 2d. *Habeas Corpus* § 27 (1999).

The relevance of the distinction between a “statutory” and a “constitutional” privilege of *habeas corpus* is not entirely clear. The federal courts’ power to review petitions under *habeas corpus* has historically relied on statute,²⁵¹ but it has been explained that the Constitution obligates Congress to provide “efficient means by which [the Writ] should receive life and activity.”²⁵² While the Court has stated that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789,’”²⁵³ it has also presumed that “the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.”²⁵⁴ The *Boumediene* Court declined to adopt a date of reference by which the constitutional scope of the writ is to be judged.²⁵⁵ Accordingly, it remains unclear whether statutory enhancements of *habeas* review can ever be rolled back without implicating the Suspension Clause.²⁵⁶ The constitutionally mandated scope of the writ may turn on the same kinds of “objective factors and practical considerations” that the Court stated would determine the territorial scope of the writ.

Under *Boumediene*, it appears that Congress’s ability to revoke altogether the courts’ jurisdiction over *habeas* petitions for certain classes of persons is constrained by the Constitution, but Congress has the power to impose some procedural regulations that may limit how courts consider such cases.²⁵⁷ Congress retains the option of withdrawing *habeas* jurisdiction if it provides an effective and adequate alternative means of pursuing relief.²⁵⁸ The Court’s opinion in *Boumediene* did not fully delineate the lower bounds of what the Court might consider as necessary either to preserve the constitutional scope of the writ or to provide an adequate substitute, but indicated that the prisoners are entitled to “a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law.”²⁵⁹ A more direct option to affect the outcome of *habeas* cases brought by detainees may involve enacting a clear statutory definition of who may be detained and the purpose of the detention, along with an appropriate procedure designed to distinguish those who meet the definition from those who do not. Such an approach could potentially increase certainty with respect to courts’ decisions regarding whether the detention of particular alleged enemy combatants comports with statutes and treaties, although constitutionally based claims may remain less predictable.

²⁵¹ *Ex parte Bollman*, 8 U.S. (4 Cr.) 75 (1807).

²⁵² *Id.* at 94.

²⁵³ INS v. St. Cyr, 533 U.S. 289, 301 (U.S. 2001).

²⁵⁴ *Felker v. Tupin*, 518 U.S. 663 (1996)(citing *Swain*, 430 U.S. 372).

²⁵⁵ See *Boumediene*, 128 S.Ct. at 2248 (“The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”).

²⁵⁶ Cf. *St. Cyr*, 533 U.S. at 340 n.5 (2001) (Scalia, J., dissenting)(“If … the writ could not be suspended within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet.”).

²⁵⁷ Cf. *Felker*, 518 U.S. 663 (Holding that restrictions on successive petitions for *habeas corpus* by prisoners convicted in state courts did not suspend the writ, but merely applied a modified *res judicata* rule to control abuse of the writ); *Boumediene*, 128 S.Ct. 2229 at 2276-77 (explaining that some reasonable regulations on *habeas* cases to relieve governmental burden or preserve security will be permissible).

²⁵⁸ See *United States v. Hayman*, 342 U.S. 205 (1952); *Hill v. United States*, 368 U.S. 424 (1962); *Swain*, 430 U.S. 372 (1977); *Felker*, 518 U.S. 651 (1996); *St. Cyr*, 533 U.S. 289.

²⁵⁹ *Boumediene*, 128 S.Ct. 2229 at 2266.

Congress could formally suspend the writ with respect to the detainees, although it is unclear whether Congress's views regarding the requirements of public safety are justiciable.²⁶⁰ If they are, then a reviewing court's assessment of the constitutionality of *habeas*-suspending legislation would likely turn on whether Al Qaeda's terrorist attacks upon the United States qualify as a "rebellion or invasion," and whether the court finds that "the public safety" requires the suspension of the writ.

Congress might be able to impose some limitations upon judicial review of CSRT determinations if it strengthened the procedural protections afforded to detainees in CSRT status hearings.

Legislation addressing some or all of the potential procedural inadequacies in the CSRT process identified in *Boumediene* might permit judicial review of CSRT determinations to be further streamlined.

In 2008, Attorney General Michael Mukasey recommended that Congress enact new legislation to eliminate the DTA appeals process and make *habeas corpus* the sole avenue for detainees to challenge their detention in civilian court, and also to eliminate challenges to conditions of confinement or transfers out of U.S. custody. In a speech before the American Enterprise Institute on July 21, 2008,²⁶¹ Attorney General Mukasey discussed this suggestion along with five other points he felt Congress should address:

- Courts should be prohibited from ordering that an alien captured and detained abroad be brought to the United States for court proceedings, or be admitted and released into the United States.
- Procedures should be put in place to ensure that intelligence information, including sources and methods, are protected from disclosure to terrorist suspects.
- Detainees awaiting trial by military commission should be prevented from bringing *habeas* petitions until the completion of their trials.
- Congress should reaffirm the authority to detain as enemy combatants persons who have "engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations."
- Congress should establish sensible procedures for *habeas* challenges by assigning one district court exclusive jurisdiction over the cases, with one judge deciding common legal issues; by adopting "rules that strike a reasonable balance between the detainees' rights to a fair hearing ... and our national security needs ..." that would "not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict"; and ensuring that court proceedings "are not permitted to interfere with the mission of our armed forces."

Other proposals that have been floated include the creation of a new national security court to authorize preventive detention of terror suspects²⁶² or the use of civilian or military courts to

²⁶⁰ The *Boumediene* Court did not address the matter because the 2006 MCA did not purport to act as a formal suspension of the writ. *Boumediene*, 128 S.Ct. at 2262.

²⁶¹ The Attorney General's prepared statement is available at <http://www.scotusblog.com/wp/mukasey-curb-courts-powers-on-detainees/>.

²⁶² See Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System, Hearing before (continued...)

prosecute all detainees who cannot be released to their home country or another country willing to take them. Among the issues associated with prosecuting all of the detainees in civilian court is that the detainees may not have committed any crimes cognizable in federal court. Persons accused of engaging in terrorist acts (including attempts, conspiracies and the like) against the United States could likely be prosecuted,²⁶³ but jurisdiction over offenses involving the provision of material support to a terrorist organization abroad is somewhat more limited, and for acts occurring prior to 2004, included only persons subject to the jurisdiction of the United States.²⁶⁴

Congress could also take no action and allow the courts to address the issues in the course of deciding the *habeas* petitions already docketed.

Scope of Challenges

Whether Congress enacts legislation to guide the courts or permits courts to resolve the *habeas* cases as they now stand, courts will be faced with determining the scope of the writ as it applies to detainees in Guantanamo and perhaps elsewhere outside the United States. Although the *Boumediene* Court held that DTA review procedures were an inadequate substitute for *habeas*, it expressly declined to assess “the content of the law that governs” the detention of aliens at Guantanamo.²⁶⁵ Nonetheless, the Supreme Court identified a number of potential deficiencies in the status review process that necessitated *habeas* review of CSRT determinations, including the detainee’s lack of counsel during the hearings; the presumption of validity accorded to the government’s evidence; procedural and practical limitations upon the detainee’s ability to present evidence rebutting the government’s charges against him and to confront witnesses; potential limitations on the detainee’s ability to introduce exculpatory evidence; and limitations on the detainee’s ability to learn about the nature of the government’s case against him to the extent that it is based upon classified evidence.²⁶⁶ Whether these procedures violate due process standards, facially or as applied in a given case, and whether a particular detainee is being unlawfully held, are issues that will be addressed by the district court when reviewing the *habeas* claims of Guantanamo detainees.

Boumediene considered challenges to the legality of detention, the issue at the heart of most of the *habeas* challenges brought by Guantanamo detainees to date. However, there are also some cases challenging the conditions under which a detainee is being held. These two categories of challenges may involve different procedural routes and the application of different constitutional rights. The extent to which Congress may limit the scope of challenges Guantanamo detainees

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the Senate Judiciary Committee, June 4, 2008. For a review and criticism of some proposals, see the Constitution Project, *A Critique of “National Security Courts,”* available at http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf.

²⁶³ See, e.g., 18 U.S.C. § 2332 (prescribing penalties for homicides of U.S. nationals abroad and other violence directed at the United States, so long as the act is “intended to coerce, intimidate, or retaliate against a government or a civilian population”); 18 U.S.C. § 2232b (acts of terrorism transcending national boundaries).

²⁶⁴ See 18 U.S.C. § 2339B (provision of material support to designated terrorist organization prior to amendment by P.L. 108-458, § 6603(d), December 17, 2004); see also 18 U.S.C. § 2339 (proscribing harboring or concealing terrorists, but only after October 26, 2001 enactment of P.L. 107-56, title VIII, § 803(a)). The *Ex Post Facto* Clause prevents prosecution for charges that would not have been applicable when the offense occurred, U.S. CONST. art. 1, § 9, cl. 3.

²⁶⁵ *Boumediene*, 128 S. Ct. 2229 at 67.

²⁶⁶ See *Boumediene*, 128 S. Ct. 2229 at 37-38, 54-56.

may bring may turn on the unresolved question of which constitutional rights apply to aliens detained in territory abroad. If detainees are transferred into the United States, the degree to which Congress may limit their access to the courts may be subject to further constitutional constraints.

The Supreme Court has not directly addressed whether there must exist a judicial forum to vindicate all constitutional rights. Justice Scalia has pointed out that there are particular cases, such as political questions cases, where all constitutional review is in effect precluded.²⁶⁷ Other commentators point to sovereign immunity and the ability of the government to limit the remedies available to plaintiffs.²⁶⁸ However, the Court has, in cases involving particular rights, generally found a requirement that effective judicial remedies must be available.²⁶⁹ Although the extent of constitutional rights enjoyed by aliens outside the territory of the United States is subject to continuing debate, the right to liberty enjoyed by aliens within the United States, except when deprived of it in accordance with due process of law, seems well established.

The Fact and Length of Detention

Unlike the appeals process under the DTA, which is no longer available to detainees as a result of the D.C. Circuit's decision in *Bismullah*,²⁷⁰ *habeas* challenges may also permit challenges to detention not based solely on the adequacy of CSRT procedures. It is unclear how much of a role CSRT proceedings will play in *habeas* cases or whether courts will abstain from hearing cases that have not yet received a CSRT ruling (should such a case occur). There is no statutory requirement that all detainees receive a CSRT determination in order to be detained, nor that detainees receive any kind of a hearing within any certain period of time after their capture. This might have left some detainees without effective means to pursue a DTA challenge. Moreover, it appears that some detainees who were determined by CSRTs to be properly classified as enemy combatants have been released from Guantanamo without a new determination, which may call into question the importance of the CSRT procedure as the primary means for obtaining release and therefore, the sole focus of a collateral challenge. Detainees may also be transferred or released based on the results of periodic reviews conducted by Administrative Review Boards (ARBs)²⁷¹ to determine whether the detainee is no longer a threat or that it is in the interest of the United States and its allies to release the prisoner. The DTA provided no opportunity to appeal the result of an ARB finding and no means of challenging a decision not to convene a new CSRT to consider new evidence.²⁷²

The scope and standard for *habeas* review involving detainees has been the subject of several orders by judges for the U.S. District Court for the District of Columbia. In such proceedings, the

²⁶⁷ 486 U.S. at 612-13 (Scalia, J., dissenting).

²⁶⁸ *Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987)(Bork, J., dissenting).

²⁶⁹ See e.g., *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987)(holding that the Constitution mandates effective remedies for takings).

²⁷⁰ *Bismullah*, 551 F.3d at 1075.

²⁷¹ See DOD Press Release, "DoD Announces Draft Detainee Review Policy" (March 3, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040303-0403.html>; Memorandum from Deputy Secretary of Defense, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Navy Base, Guantanamo Bay, Cuba (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

²⁷² CSRT Implementing Directive, *supra* footnote 38, at encl. 10 (implementing Detainee Treatment Act provisions).

government has the burden of demonstrating, by a preponderance of the evidence, the lawfulness of the petitioner's detention.²⁷³ The government is also required to explain its legal justification for detaining the petitioner, including, where appropriate, the standard it uses to define the scope of its detention authority.²⁷⁴

The government is also required to provide the petitioner with all reasonably available exculpatory evidence.²⁷⁵ In December 2008, Senior Judge Thomas F. Hogan, who is coordinating and managing most Guantanamo cases for the D.C. District Court, issued a case management order that, among other things, requires the government to disclose any evidence it has relied upon to justify the petitioner's detention.²⁷⁶ With respect to classified information, Judge Hogan's order requires the government, unless granted an exception by the district court judge considering the case's merits, to "provide the petitioner's counsel with the classified information, provided the petitioner's counsel is cleared to access such information. If the government objects to providing the petitioner's counsel with the classified information, the government shall move for an exception to disclosure." There is no requirement that classified information be provided to a petitioner himself. Moreover, the order rescinds the requirement of an earlier case management order that petitioners receive an "adequate substitute" for any classified information disclosed to the court or petitioners' counsel.²⁷⁷

In January 2010, a D.C. Circuit panel held in the case of *Al-Bihani v. Obama* that the procedural protections afforded in *habeas* cases involving wartime detainees do not need to mirror those provided to persons in the traditional criminal law context. Judge Janice Rogers Brown, writing for herself and another member of the panel, argued that a lower procedural standard may exist in *habeas* cases involving challenges to wartime detention, as "national security interests are at their zenith and the rights of the alien petitioner [are] at their nadir."²⁷⁸ The government needs only to support its detention using a "preponderance of evidence" standard.²⁷⁹ The panel also held that *habeas* courts assessing the validity of a petitioner's detention could properly consider hearsay evidence proffered by the government in support of his detention. According to the majority opinion,²⁸⁰ "the question a *habeas* court must ask when presented with hearsay is not whether it is

²⁷³ See *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2008 WL 4858241, Order, at *3 (D.D.C. November 6, 2008) (Hogan, J.) (hereinafter "November Order").

²⁷⁴ See *id.* at * 1; *el Gharani v. Bush*, 593 F.Supp.2d 144 (D.D.C. 2009) (Leon, J.) (finding that when the government justifies the detention of a *habeas* petitioner on the ground that he is an "enemy combatant," it must provide a definition of the term).

²⁷⁵ See November Order, *supra* footnote 273, at *1. See also *Boumediene v. Bush*, No. 04-1166, Order (D.D.C. August 27, 2008) (Leon, J.), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/leon-case-manage-order-8-27-08.pdf> (requiring government to provide "any evidence contained in the material reviewed in developing the return for the petitioner, and in preparation for the hearing for the petitioner, that tends materially to undermine the Government's theory as to the lawfulness of petitioner's detention"). *Habeas* judges have found that information compiled by the Task Force established under Executive Order 134992 (concerning the proposed closure of the Guantanamo detention facility) is "reasonably available evidence" that may be considered in the context of a Guantanamo detainee's *habeas* petition. See, e.g., *Bin Attash v. Obama*, 628 F.Supp.2d 24, 38 (D.D.C. 2009) (citing rulings in several *habeas* cases).

²⁷⁶ *In re Guantanamo Bay Detainee Litigation*, No. 08-0442, 2008 WL 5245890, Order, at *1 (D.D.C., December 16, 2008) (Hogan, J.).

²⁷⁷ November Order, *supra* footnote 273, at *2.

²⁷⁸ *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411, at *9 (D.C. Cir. Jan. 5, 2010).

²⁷⁹ *Id.*

²⁸⁰ Senior Judge Stephen F. Williams, the third member of the *Al-Bihani* panel, declined to join the majority's analysis regarding the procedures used by the *habeas* court to review the petitioner's claim, finding this discussion unnecessary (continued...)

admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits.”²⁸¹

Conditions of Detention

Although it appears less common for challenges to prison conditions to be entertained under *habeas* review, such cases have been heard by federal courts on *habeas* petitions.²⁸² Persons incarcerated in federal prisons may also ask a district court to address such complaints using their general jurisdiction to consider claims that arise under the Constitution,²⁸³ by means of a writ of mandamus.²⁸⁴ These writs, which are directed against government officials, have been used to require those officials to act in compliance with constitutional requirements. Although these challenges are often denied on the merits or on procedural grounds, cases have been brought based on the First Amendment,²⁸⁵ Sixth Amendment,²⁸⁶ Eighth Amendment²⁸⁷ and various other grounds.²⁸⁸

The *Boumediene* Court declined to discuss whether challenges to conditions of detention are within the constitutional scope of the writ as it applies to Guantanamo detainees.²⁸⁹ A variety of challenges has been raised by detainees in Guantanamo regarding conditions of their detention, including such issues as whether prisoners can be held in solitary confinement,²⁹⁰ when they can

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“since the facts that Al Bihani says are correct readily yield a ruling that his detention is legally permissible.” *Id.* at 16 (Williams, J., concurring in part and concurring in judgment).

²⁸¹ *Id.* at 10.

²⁸² “A motion pursuant to § 2241 generally challenges the execution of a federal prisoner’s sentence, including such matters as the administration of parole, computation of a prisoner’s sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions.” *Jiminian v. Nash*, 245 F.3d 144 (2d Cir. 2001). *See, e.g.*, *Rickenbacker v. United States*, 365 F. Supp. 2d 347 (E.D.N.Y. 2005) (challenging failure to provide drug and psychiatric treatment in accordance with sentencing court’s recommendation).

²⁸³ 28 U.S.C. § 1331. *See Caldwell v. Miller*, 790 F.2d 589 (7th Cir. 1986).

²⁸⁴ Russell Donaldson, *Mandamus, under 28 U.S.C.A. §1361, To Obtain Change in Prison Condition or Release of Federal Prisoner*, 114 A.L.R. Fed. 225 (2005). Relief in mandamus is generally available where: (1) the plaintiff can show a clear legal right to the performance of the requested action; (2) the duty of the official in question is clearly defined and nondiscretionary; (3) there is no other adequate remedy available to the plaintiff; (4) there are other separate jurisdictional grounds for the action. *Id.* at 1(a). A writ of mandamus may issue only where ‘the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.’ *Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D.C. 2004), quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995).

²⁸⁵ *See Long v. Parker*, 390 F.2d. 816 (3rd Cir. 1968) (prisoner suit to obtain access to religious weekly newspaper stated a valid cause of action worthy of a factual hearing).

²⁸⁶ *Stover v. Carlson*, 413 F. Supp. 718 (D. Conn. 1976) (ending federal prison practice of opening privileged communications outside of prisoner’s presence).

²⁸⁷ *Fullwood v. Clemmer*, 206 F. Supp. 370 (D.C.C. 1962) (keeping prisoner in solitary confinement for more than two years for minor disciplinary infractions violates the Eighth Amendment). It should be noted that where a prisoner has not yet been convicted of a crime, a challenge to conditions of detentions may sound in Due Process rather than as an Eighth Amendment challenge. *Bell v. Wolfish*, 441 U.S. 520 (1979).

²⁸⁸ *See generally Donaldson, supra* footnote 284.

²⁸⁹ *See Boumediene*, 128 S. Ct. 2229 at 2274 (“In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.”).

²⁹⁰ Paul Shukovsky, *Terrorism Suspect’s Suit Tells of U.S. Abuse: Documents in Guantanamo Case Describe Extreme Isolation*, SEATTLE POST-INTELLIGENCER, August 6, 2004, at A1.

be transferred,²⁹¹ or whether they can have contact with relatives.²⁹² Although some of these were brought as *habeas corpus* cases,²⁹³ Guantanamo detainees have also sought relief from the courts using the All Writs Act,²⁹⁴ principally to prevent their transfer to other countries without notice,²⁹⁵ but for other reasons too.²⁹⁶ Use of the All Writs Act by a court is an extraordinary remedy, generally not invoked if there is an alternative remedy available.²⁹⁷

In April 2009, a D.C. Circuit panel interpreted *Boumediene* as invalidating the MCA's court-stripping provisions with respect "to all *habeas* claims brought by Guantanamo detainees, not simply with respect to so-called 'core' *habeas* claims."²⁹⁸ In that case, the panel found that *habeas* courts could consider not only Guantanamo detainees challenges to the legality of their detention, but also their proposed transfer to another country (though *habeas* review of such transfers may be quite limited).²⁹⁹ Accordingly, whether Guantanamo detainees may challenge their conditions of confinement may depend on whether a reviewing court considers these conditions to be "a proper subject of ... *habeas* relief."³⁰⁰ *Habeas* courts have thus far rejected challenges by Guantanamo detainees relating to their conditions of detention.³⁰¹

The rejection of challenges to conditions of confinement may be based, at least in part, upon the opinion that any such claim by Guantanamo detainees does not derive from a constitutional protection to which they are entitled. In February 2009, a D.C. Circuit panel held in the case of *Kiyemba v. Obama* that the Constitution's due process protections did not extend to non-citizen detainees held at Guantanamo.³⁰² The Supreme Court has agreed to hear an appeal of the panel's ruling later this term. Presuming that the panel's holding concerning the due process rights of Guantanamo detainees is not overturned, however, the ability of non-citizen detainees held outside the United States to challenge the conditions of their detention may be quite limited. In contrast, if detainees currently held at Guantanamo are transferred into the United States, they might be able to more successfully pursue legal challenges against aspects of their detention that allegedly infringe upon constitutional protections owed to them.

²⁹¹ Al-Anazi v. Bush, 370 F. Supp. 2d 188 (D.D.C. 2005).

²⁹² Josh White, *Lawyers Seek Improved Conditions for Suicidal Detainee*, WASH. POST, November 5, 2005, at A8.

²⁹³ See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005)(rejecting claims on other grounds).

²⁹⁴ All Writs Act, 28 U.S.C. § 1651.

²⁹⁵ Belbach v. Bush, 520 F.3d 452, 456 (D.C. Cir. 2008) (holding the 2006 MCA leaves intact the presumptive jurisdiction of federal courts to inquire into the constitutionality of a jurisdiction-stripping statute). *See also* Al Ansi v. Bush, No. 08-1923, 2008 WL 5412360, Order (D.D.C., December 29, 2008) (requiring government to give court and petitioner's counsel 30 days' notice prior to releasing or transferring petitioner from Guantanamo).

²⁹⁶ *See El-Banna v. Bush*, No. 04-1144, 2005 WL 1903561 (D.D.C. July 18, 2005) (seeking preservation of records relating to treatment of detainees).

²⁹⁷ Al-Anazi v. Bush, 370 F. Supp. 2d 188, 196 (D.D.C. 2005).

²⁹⁸ Kiyemba v. Obama, 561 F.3d 509, 512-513 (D.C. Cir. 2009).

²⁹⁹ *Id.* at 513-514 (when executive branch has determined that a detainee will not be tortured if transferred to a particular country, a *habeas* court may not second-guess this assessment).

³⁰⁰ *Id.* at 513.

³⁰¹ *See supra* footnote 220.

³⁰² Kiyemba v. Obama, 555 F.3d 1022, 1026-1027 (D.C. Cir. 2009).

Available Remedy

Under Title 28, U.S. Code, a court conducting *habeas* review must “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the detainee is not entitled to it.”³⁰³ The court can order either party to expand the record by submitting additional information bearing on the petition.³⁰⁴ The court may order hearings to assist it in determining the facts, and is authorized to “dispose of the matter as law and justice require,”³⁰⁵ or in criminal cases, to vacate a sentence, grant a new trial, or order that a prisoner be released.³⁰⁶

By contrast, the DTA review procedures did not address the remedies available to detainees who prevail in a challenge. Detainees who succeed in persuading a CSRT that they are not enemy combatants do not have an express right to release or even a right initially to be informed of the CSRT’s decision. If the CSRT Director approves a finding that a detainee is no longer an enemy combatant, the detainee may be held for as long as it takes the government to arrange for his transfer to his home country or another country willing to provide asylum, during which time he need not be told of the CSRT’s conclusion.³⁰⁷ According to one report of unclassified CSRT records, in the event the CSRT Director disapproves of the finding, new CSRTs may be convened, apparently without notifying or permitting the participation of the detainee, although the government might present new evidence to the new panel.³⁰⁸

The Supreme Court viewed the lack of an express power permitting the courts to order the release of a detainee as a factor relevant to the DTA’s inadequacy as a substitute proceeding.³⁰⁹ In the context of CSRT determinations, the government suggested to the Court that remand for new CSRT proceedings would be the appropriate remedy for a determination that an error of law was made or that new evidence must be considered.³¹⁰ Whether such a remedy would be acceptable probably depends on whether measures are taken to decrease the risk of error under the CSRT procedures.

The available remedy for Guantanamo detainees found to be unlawfully held by the United States is an issue of ongoing litigation. The typical remedy for *habeas* claims is the release of the individual being unlawfully detained.³¹¹ But given that detainees are being held in a military facility in Cuba, it is unclear whether the order of their release is a practical remedy, particularly in cases where the government is unable to effectuate a detainee’s transfer to a third country.

³⁰³ 28 U.S.C. § 2243.

³⁰⁴ Rules Governing § 2255 Cases, Rule 7, 28 U.S.C.A. foll. § 2255 (applicable to prisoners subject to sentence of a federal court).

³⁰⁵ 28 U.S.C. § 2243.

³⁰⁶ 28 U.S.C. § 2255.

³⁰⁷ CSRT Implementing Directive, *supra* footnote 38 at encl. 1, para. I(9)-(10).

³⁰⁸ See Mark Denbeaux et al., *No-Hearing Hearings, CSRT: The Modern Habeas Corpus?*, at 37-40 (2006), available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf. The named author is a professor at Seton Hall University School of Law and serves as counsel to two Guantanamo detainees.

³⁰⁹ *Boumediene*, 128 S.Ct. at 2271.

³¹⁰ See Gov’t Br. in Opp. to Pet. for Reh’g, *Boumediene v. Bush*, No. 16-1195 (U.S.).

³¹¹ See, e.g., *Munaf v. Geren*, 553 U.S. ___, 128 S.Ct. 2207, 2221 (2008) (“The typical remedy for ... [unlawful] detention is, of course, release.”); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he traditional function of the writ is to secure release from illegal custody”).

Whether or not a court would have the power to craft a *habeas* remedy for Guantanamo detainees that permits their entry into the United States remains unresolved. The Supreme Court has recognized that *habeas* relief “is at its core, an equitable remedy,”³¹² and judges have broad discretion to fashion an appropriate remedy for a particular case. On the other hand, in the immigration context, courts have long recognized that the political branches have plenary authority over whether arriving aliens may enter the United States.³¹³

As previously discussed, in October 2008, a federal district court ordered the release into the United States of 17 Guantanamo detainees who were no longer considered enemy combatants, finding that the political branches’ plenary authority in the immigration context did not contravene the petitioners’ entitlement to an effective remedy to their unauthorized detention.³¹⁴ However, the D.C. Circuit panel stayed the district court’s order pending appellate review,³¹⁵ and subsequently reversed the district court’s decision in the case of *Kiyemba v. Obama*, decided in February 2009. Writing for the majority of the panel, Judge Randolph stated that federal courts lacked the authority to order a non-citizen detainee’s entry and release into the United States. In reaching this conclusion, the majority opinion cited long-standing Supreme Court jurisprudence in the immigration context which recognized and sustained, “without exception … the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms.”³¹⁶ According to the majority, this jurisprudence made clear that it was “not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”³¹⁷

The *Kiyemba* majority held that the district court lacked the legal authority to override the Executive’s determination not to admit the petitioners into the United States. The majority held that the district court’s order was not supported by federal statute or treaty. The majority also found that aliens held at Guantanamo were not protected by the Due Process Clause of the Constitution, and the district court’s order therefore could not be based upon a liberty interest owed to the petitioners under the Constitution. The *Kiyemba* majority also found that the district court’s order was improper to the extent that it was based on the notion that where there is a legal right, there must also be a remedy. The majority stated that it did “not believe the maxim reflects federal statutory or constitutional law.”³¹⁸ While acknowledging that the Supreme Court’s decision in *Boumediene* made clear that the constitutional writ of *habeas* extended to Guantanamo detainees, the *Kiyemba* majority held that the constitutional writ of *habeas* did not entitle petitioners to the “extraordinary remedy” of being ordered transferred and released into the United States.³¹⁹

³¹² *Schlup v. Delo*, 513 U.S. 298, 319 (1995).

³¹³ *Landon v. Plasencia*, 459 U.S. 21, 32 (1981) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (finding that an inadmissible alien’s “right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate”).

³¹⁴ *In re Guantanamo Bay Detainee Litigation*, 581 F.Supp.2d 33(D.D.C. 2008).

³¹⁵ *Kiyemba v. Bush*, No. 08-5424, 2008 WL 4898963, Order (D.C. Cir., October 20, 2008) (*per curiam*).

³¹⁶ *Kiyemba*, 555 F.3d at 1025-1026.

³¹⁷ *Id.* at 1027 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)).

³¹⁸ *Id.*

³¹⁹ *Id.* at 1028.

Writing separately from the *Kiyemba* majority, Judge Rogers argued that the majority's opinion was "not faithful to *Boumediene* and would compromise both the Great Writ as a check on arbitrary detention and the balance of powers over exclusion and admission and release of aliens into the United States."³²⁰ She would have found that the Executive has no independent authority to detain aliens to prevent their entry into the United States, and would have held that a *habeas* court has the power to order the conditional release of a Guantanamo detainee into the United States when the Executive lacks authority to detain him. Nonetheless, she concurred with the majority's judgment that the district court's order was improper, because the lower court had not considered whether the Executive was authorized to detain the petitioners pursuant to U.S. immigration laws even after it had determined that they were not "enemy combatants."

The Supreme Court has agreed to review the appellate court's ruling in the case of *Kiyemba v. Obama* later this term.

Extraterritorial Scope of Constitutional Writ of *Habeas*

In *Boumediene*, the Supreme Court held that the constitutional writ of *habeas* extended to persons detained at Guantanamo, even though they are held outside the *de jure* sovereign territory of the United States. Left unresolved in the Court's discussion of the extraterritorial application of the Constitution is the degree to which the writ of *habeas* and other constitutional protections applies to aliens detained in foreign locations other than Guantanamo (e.g., at military facilities in Afghanistan and elsewhere, or at any undisclosed U.S. detention sites overseas). In April 2009, a federal district court held that the constitutional writ of *habeas* extended to at least some detainees held by the United States at the Bagram Theater Internment Facility in Afghanistan.³²¹

The *Boumediene* Court indicated that it would take a functional approach in resolving such issues, taking into account "objective factors and practical concerns" in deciding whether the writ extended to aliens detained outside U.S. territory. Practical concerns mentioned in the majority's opinion as relevant to an assessment of the writ's extraterritorial application include the degree and likely duration of U.S. control over the location where the alien is held; the costs of holding the Suspension Clause applicable in a given situation, including the expenditure of funds to permit *habeas* proceedings and the likelihood that the proceedings would compromise or divert attention from a military mission; and the possibility that adjudicating a *habeas* petition would cause friction with the host government.³²² The *Boumediene* Court declined to overrule the Court's prior decision in *Eisentrager*, in which it found that convicted enemy aliens held in post-WWII Germany were precluded from seeking *habeas* relief. Whether enemy aliens are held in a territory that more closely resembles post-WWII Germany than present-day Guantanamo may influence a reviewing court's assessment of whether the writ of *habeas* reaches them, as well as its assessment of the merits of the underlying claims.

In April 2009, District Court Judge John D. Bates found in the case of *Al Maqaleh v. Gates* that the constitutional writ of *habeas* may extend to non-Afghan detainees currently held by the United States at the Bagram Theater Internment Facility in Afghanistan, when those detainees had been captured outside of Afghanistan but were transferred to Bagram for long-term detention as

³²⁰ *Id.* at 1032 (Rogers, J., concurring).

³²¹ *Al Maqaleh v. Gates*, 604 F.Supp.2d 205 (D.D.C. 2009).

³²² *Boumediene*, 128 S.Ct. at 2261-62.

enemy combatants. Judge Bates held that the circumstances surrounding the detention of the petitioners in *Al Maqaleh* were “virtually identical to the detainees in *Boumediene* – they are [non-U.S.] citizens who were ... apprehended in foreign lands far from the United States and brought to yet another country for detention.”³²³ Applying the factors discussed in *Boumediene* as being relevant to a determination of the extraterritorial scope of the writ of *habeas corpus*, Judge Bates concluded that the writ extended to three of the four petitioners at issue in *Al Maqaleh*, who were not Afghan citizens. The constitutional writ was not found to extend to a fourth petitioner who was an Afghan citizen, however, because review of his *habeas* petition could potentially cause friction with the Afghan government.³²⁴ This ruling has been appealed. Presuming that the ruling is upheld, it could have significant ramifications for U.S. detention policy, as at least some foreign detainees held outside the United States or Guantanamo could seek review of their detention by a U.S. court. On September 14, 2009, the DOD announced modifications to the administrative process used to review the status of aliens held at Bagram, which would afford detainees greater procedural rights. The modified process does not contemplate judicial review of administrative determinations regarding the detention of persons at Bagram.³²⁵

Use of *Habeas* Petitions to Challenge the Jurisdiction of Military Commissions

Whether detainees who are facing prosecution by a military commission may challenge the jurisdiction of such tribunals prior to the completion of their trial remains unsettled, although the district court has so far declined to enjoin military commissions.³²⁶ Supreme Court precedent suggests that *habeas corpus* proceedings may be invoked to challenge the jurisdiction of a military court even where *habeas corpus* has been suspended.³²⁷ *Habeas* may remain available to defendants who can make a colorable claim not to be enemy belligerents within the meaning of the MCA, and therefore to have the right not to be subject to military trial at all, perhaps without necessarily having to await a verdict or exhaust the appeals process.³²⁸ Interlocutory challenges contesting whether the charges make out a valid violation of the law of war, for example, seem less likely to be entertained on a *habeas* petition.³²⁹

³²³ *Al Maqaleh*, 604 F. Supp. 2d at 208.

³²⁴ *Id.* at 229-230.

³²⁵ Under this new system, detainees would undergo a case review within 60 days of incarceration, with periodic review occurring roughly every six months thereafter. Further, U.S. military members shall act as personal representatives to assist detainees during the review process. DOJ Brief, *supra* footnote 235; Bagram Policy Guidance, *supra* footnote 235; Gerry J. Gilmore, “Bagram Detention Facility to Implement Case Review Panels,” *American Forces Press Service*, September 14, 2009, <http://www.defenselink.mil/news/newsarticle.aspx?id=55831>.

³²⁶ See Khadr v. United States, No. 07-1405 (D.C. Cir. June 20, 2008); Hamdan v. Gates, No. 04-1519 (JR) (D.D.C. July 18, 2008)(order denying injunction of military commission proceedings).

³²⁷ See *ex parte* Milligan, 71 U.S. (4 Wall.) 2, 115-16 (1866); cf. *ex parte* Quirin, 317 U.S. 1, 24-25 (1942)(dismissing contention that presidential proclamation stripped Court of authority to review case, stating that “nothing in the Proclamation precludes access to the courts for determining its applicability to the particular case”).

³²⁸ Schlesinger v. Councilman, 420 U.S. 738, 759 (1975)(finding judicial abstention is not appropriate in cases in which individuals raise “‘substantial arguments denying the right of the military to try them at all,’” and in which the legal challenge “turn[s] on the status of the persons as to whom the military asserted its power”); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 76 (1955). But see Al Odah v. Bush, 593 F. Supp. 2d 53 (D.D.C. 2009) (court would stay consideration of *habeas* claims during course of military commission proceedings, but stay would not occur until charges were referred to commission); Khadr v. Bush, 587 F. Supp. 2d 225 (D.D.C. 2008) (ordering stay in *habeas* case to the extent that it raised issues that have been, will be, or can be raised in military commission proceedings against petitioner and the subsequent appeals process).

³²⁹ Cf. New v. Cohen, 129 F.3d 639, 643 (D.C. Cir. 1997).

Conclusion

The Executive's policy of detaining wartime captives and suspected terrorists at the Guantanamo Bay Naval Station has raised a host of novel legal questions regarding, among other matters, the relative powers of the President and Congress to fight terrorism, as well as the power of the courts to review the actions of the political branches. The DTA was Congress's first effort to impose limits on the President's conduct of what the Bush Administration termed the "Global War on Terror" and to prescribe a limited role for the courts. The Supreme Court's decision striking the DTA provision that attempted to eliminate the courts' *habeas* jurisdiction may be seen as an indication that the Court will continue to play a role in determining the ultimate fate of the detainees at Guantanamo. However, the Court did not foreclose all options available to Congress to streamline *habeas* proceedings involving detainees at Guantanamo or elsewhere in connection with terrorism. Instead, it indicated that the permissibility of such measures will be weighed in the context of relevant circumstances and exigencies.

As a general matter, the courts did not accept the Bush Administration's view that the President has inherent constitutional authority to detain those he suspects may be involved in international terrorism. Rather, the courts have looked to the language of the AUMF and other legislation to determine the contours of presidential power. The Supreme Court has interpreted the AUMF with the assumption that Congress intended for the President to pursue the conflict in accordance with traditional law-of-war principles, and has upheld the detention of a "narrow category" of persons who fit the traditional definition of "enemy belligerent" under the law of war. Other courts have been willing to accept a broader definition of enemy belligerency to permit the detention of individuals who were not captured in circumstances suggesting their direct participation in hostilities against the United States, but a plurality of the Supreme Court warned that a novel interpretation of the scope of the law of war might cause their understanding of permissible executive action to unravel. Consequently, Congress may be called upon to consider legislation to support the full range of authority asserted by the executive branch in connection with the "war on terror." In the event the Court finds that the detentions in question are fully supported by statutory authorization, whether on the basis of existing law or new enactments, the key issue is likely to be whether the detentions comport with due process of law under the Constitution. In the event that detainees currently held at Guantanamo are transferred into the United States, such persons may receive more significant constitutional protections. These protections may inform executive policy, legislative proposals, and judicial rulings concerning matters relating to detainees' treatment, continued detention, and access to federal courts.

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